135-465

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~1198~~ 798

GEORGE A. BOWMAN AND FRED W. BOWMAN,
PLAINTIFFS IN ERROR,

vs.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 16, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1196.

GEORGE A. BOWMAN AND FRED W. BOWMAN,
PLAINTIFFS IN ERROR,

vs.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, district judge of the United States for said district, on Wednesday, the sixth day of October, in the adjourned October [term] of said court, in the year of our Lord one thousand eight hundred and eighty-six, and of our Independence the one hundred and eleventh year.

WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

GEORGE A. BOWMAN and FRED. W. BOWMAN

vs.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

Trespass on the case.

Be it remembered that on [the] fifteenth day of June, 1886, came the plaintiffs, by their attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, their *præcipe* for a writ of summons, and also at the same time filed their bond for costs in said above-entitled cause, which said *præcipe* and bond are respectively in the words and figures following, to wit:

2 STATE OF ILLINOIS, } *ss:*
County of Cook, }

Circuit Court of the United States, Northern Dis triet of Illinois.
July Term, A. D. 1886.

GEORGE A. BOWMAN and FRED. W. BOWMAN, Plaintiffs,

vs.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant.

Damages, $10,000.

The clerk of said court will issue a summons in the above-entitled cause to said defendant in a plea of trespass on the case, to the damage of said plaintiffs in the sum of ten thousand dollars, direct the same to the marshal for said district to execute, and make it returnable to the July term of said court, A. D. 1886.

Chicago, June 15th, 1886.

BLUM & BLUM,
Plaintiffs' Attorneys.

To W. H. Bradley, Esq., clerk.

(Endorsed:) Filed this 15th day of June, A. D. 1886. Wm. H. Bradley, clerk.

3 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

Circuit Court. July Term, A. D. 1886.

GEORGE A. BOWMAN and FRED. W. BOWMAN
vs.
THE CHICAGO & NORTHWESTERN RAILWAY COMPANY. } In ——.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by them I hereby agree and stipulate that execution may issue against my property for any costs taxed against plaintiffs.

Dated this 15th day of June, A. D. 1886.

LOUIS J. BLUM.

(Endorsed:) Filed June 15, A. D. 1886. Wm. H. Bradley, clerk.

4 On the same day, to wit, on the 15th day of June, 1886, came the plaintiffs, by their attorneys, and filed in said clerk's office their declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States, Northern District of Illinois. To the July Term, 1886, Thereof.

GEORGE A. BOWMAN and FRED. W. BOWMAN, Copartners under the Firm Name and Style of Bowman Bros.,
vs.
THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

George A. Bowman, a citizen of the State of Nebraska, and Fred. W. Bowman, a citizen of the State of Iowa, copartners doing business under the name, firm, and style of Bowman Bros. at the city of Marshalltown, State of Iowa, plaintiffs in this suit, by Blum & Blum, their attorneys, complain of the Chicago & Northwestern Railway Company, a citizen of the northern district of the State of Illinois, having its principal office at the city of Chicago, in said State, defendant in this suit, of a plea of trespass on the case.

For that whereas the defendant, on May 20th, 1886, and for a long time previous thereto and thereafter, was possessed of
5 and using and operating a certain railway, and was a common carrier of goods and chattels thereon for hire, to wit, from the city of Chicago, in the State of Illinois, to the city of Council Bluffs, in the State of Iowa.

That said defendant was at said time and is now a corporation existing under and by virtue of the laws of the State of Illinois, and that it was and is the duty of said defendant to carry from and to

all stations upon its line of railway all freight tendered it for shipment.

That upon May 20th, 1886, the plaintiffs offered to said defendant for shipment over its line of railway, and directed to themselves at Marshalltown, Iowa, five thousand barrels of beer, which they had procured in the city of Chicago, to be shipped from said city to the city of Marshalltown, in the State of Iowa, which is a station lying and being on said defendant's line of railroad between said cities of Chicago and Council Bluffs, but the defendant then and there refused to receive said beer, or any part thereof, for shipment, to the damage of the plaintiffs of ten thousand dollars, and therefore they bring their suit, etc.

And for that the plaintiffs, neither of whom is a hotel-keeper, a keeper of a saloon, eating-house, grocery, or confectionery, on the 7th day of July, 1884, and upon several occasions thereafter, presented to the board of supervisors of Marshall county, Iowa, a certificate signed by a majority of the legal electors of Marshalltown, Marshall county, Iowa, which stated that said Fred. W. Bowman is

6 a citizen of said county; that both of said plaintiffs possess a good moral character, and that they (said electors) believe said plaintiffs to be proper persons, and each of them to be a proper person, to buy and sell intoxicating liquors for the purposes named in section 1526 of the Iowa Code; that at said time and upon several occasions thereafter they and each of them, the said plaintiffs, filed a bond in the sum of three thousand dollars with two sureties, which bond was approved by the auditor of said county, as is provided by section 1528 of the Code of Iowa; that thereupon said board of supervisors refused to grant such permission to either of said plaintiffs, or to them jointly.

And for that whereas the defendant, on May 20th, 1886, and for a long time previous thereto and thereafter, was possessed of and using and operating a certain railroad, and was a common carrier of goods and chattels thereon for hire, to wit, from the city of Chicago, in the State of Illinois, to the city of Council Bluffs, in the State of Iowa.

That said defendant is a corporation existing under and by virtue of the laws of the State of Illinois; that it was the duty of the said defendant to carry from and to all stations upon its line of railway all freight that might be entrusted to it, and that it was the duty of said defendant to transport from said city of Chicago to said city of Marshalltown the five thousand barrels of beer hereinbefore and hereinafter mentioned, which plaintiff- requested it so to transport: that in the commencement of May, 1886, the plaintiffs

7 purchased, at the city of Chicago, five thousand barrels of beer, at $6.50 per barrel, which beer they intended to send to Marshalltown, Iowa, at which place and vicinity they could have sold said beer at eight dollars per barrel, as the defendant was then and there informed; that on May 20th, 1886, said plaintiffs offered for shipment to said defendant railway company said five thousand barrels of beer, directed to said plaintiffs, at the city of Marshalltown, in the State of Iowa, and requested said defendant to ship

said beer over its road, with which request the defendant refused to comply, and declined to ship or receive said beer or any part thereof for shipment as aforesaid, the said defendant, by its duly authorized agent, then and there stating that the said defendant company declined to receive said goods for shipment and would continue to decline to receive said goods or any goods of like character for shipment into the State of Iowa; that on said day, to wit, May 20th, 1886, and for a long time theretofore and since, the plaintiffs were unable to purchase beer in the State of Iowa; that said plaintiffs, at said time, could procure no other means of transportation for said beer than said defendant, and that, by reason of the defendant's refusal to transport said beer, plaintiffs were compelled to sell said beer in the city of Chicago at $6.50 per barrel.

8 That by reason of said refusal of said defendant to ship said beer plaintiffs have been damaged in the sum of ten thousand dollars, and therefore they bring their suit, etc.

BLUM & BLUM,
Attorneys for Plaintiffs.

(Endorsed:) Filed June 15, 1886. Wm. H. Bradley, clerk.

9 Afterwards, to wit, on the 15th day of July, 1886, came the defendant, by its attorney, and filed in said clerk's office its plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois. To the July Term, A. D. 1886.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY
ads.
GEORGE A. BOWMAN *et al.*

Now comes the said defendant, by W. C. Goudy, its attorney, and defends the wrong and injury, when, &c., and says *actio non*, &c., because it says that the beer in said five thousand barrels in the plaintiff's declaration and in each count thereof mentioned was, at the several times in said declaration mentioned, and still is, intoxicating liquors, within the meaning of the statute of Iowa hereinafter set forth; that the city of Marshalltown in said declaration mentioned is within the limits of the State of Iowa; that the said city of Chicago in the said declaration mentioned is in the State of Illinois; that the said beer in said declaration mentioned

10 was offered to this defendant to be transported from the State of Illinois into the State of Iowa.

That heretofore, to wit, on the 5th day of April, A. D. 1886, the General Assembly of the State of Iowa passed an act entitled "An act amendatory of chapter 143 of the acts of the twentieth General

Assembly, relating to intoxicating liquors and providing for the more effectual suppression of the illegal sale and transportation of intoxicating liquors and abatement of nuisances," which act is chapter 66 of the laws of Iowa passed at the twenty-first General Assembly of said State, and which is printed and published in the laws of Iowa for the year 1886, at page —: to which act this defendant hereby refers and makes the same a part of this plea.

That in and by the tenth section of said act it was and is provided as follows, to wit:

"That section 1553 of the Code, as amended and substituted by chapter 143 of the acts of the twentieth General Assembly be, and the same is hereby, repealed and the following enacted in lieu thereof:

"SEC. 1553. If any express company, railway company, or any agent or person in the employ of any express company or railway company, or of any common carrier or any person in the employ of any common carrier, or any person, knowingly bring within this State for any person or persons or corporation, or shall knowingly transport or convey between points or from one place
11 to another in this State for any other person or persons or corporation any intoxicating liquors without first having been furnished a certificate from and under the seal of the county auditor of the county to which said liquor is to be transported or is consigned for transportation or within which it is to be conveyed from place to place, certifying that the consignee or person to whom said liquor is to be transported, conveyed, or delivered is authorized to sell such intoxicating liquors in such county, such company, corporation, or person so offending, and each of them, and any agent of such company, corporation, or person so offending, shall, upon conviction thereof, be fined in the sum of one hundred dollars for each offense and pay costs of prosecution, and the costs shall include a reasonable attorney fee, to be assessed by the court, which shall be paid into the county fund, and stand committed to the county jail until such fine and costs of prosecution are paid. The offense herein defined shall be held to be complete and shall be held to have been committed in any county of the State through or to which said intoxicating liquors are transported or in which the same is unloaded for transportation or in which said liquors are conveyed from place to place or delivered. It shall be the duty of the several county auditors of this State to issue the certificate herein contemplated to any person having such permit, and the certificate so issued shall be truly dated when issued and
12 shall specify the date at which the permit expires, as shown by the county records."

And the defendant avers that at the several times mentioned in said declaration, and each of them, the aforesaid section was the law of the State of Iowa in full force and wholly unrepealed, and that the said plaintiffs did not at any time furnish this defendant with a certificate from and under the seal of the county auditor of the county of Marshall, the same being the county in which said city of Marshalltown is located, and the county to which said beer was

offered to be transported, certifying that the person for or to whom the said beer was to be transported was authorized to sell intoxicating liquors in said county of Marshall, nor was this defendant furnished with any such certificate by any person whatsoever.

And the defendant avers that it could not receive said beer for transportation in the manner named and specified in the plaintiff's declaration without violating the law of the State of Iowa above specified, and without subjecting itself to the penalties provided in said act, and that this defendant assigned, at the time the said beer was offered to it for transportation as aforesaid, as a reason why it could not receive the same, the aforesaid statute of Iowa, which prohibited this defendant from receiving said beer to be trans-
13 ported into the State of Iowa or from transporting the said beer into the State of Iowa.

And this the said defendant is ready to verify. Wherefore it prays judgment, &c.

W. C. GOUDY,
Defendant's Attorney.

(Endorsed:) Filed July 15, 1886. Wm. H. Bradley, clerk.

14 Afterwards, to wit, on the 19th day of July, 1886, came the plaintiffs, by their attorneys, and filed in said clerk's office their demurrer to the plea of the defendant in said entitled cause, which said demurrer is in the words and figures following, to wit:

Demurrer.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois. To the July Term, A. D. 1886.

GEORGE A. BOWMAN *et al.*
vs.
THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

And the plaintiffs, by Blum & Blum, their attorneys, as to the plea of the defendant by it above pleaded, say that the same and the matters therein contained in manner and form as the same are above pleaded are not sufficient in law to bar them, the plaintiffs, from having their aforesaid action, and they are not bound by law to answer the same, and this they are ready to verify. Wherefore, for want of a sufficient plea in this behalf, the plaintiffs pray judgment, and their damages, etc., to be adjudged to them, etc.

And the plaintiffs, by Blum & Blum, their attorneys, as to the plea of the defendant by it above pleaded, say that the same
15 and the matters therein contained in manner and form as the same are above pleaded, are not sufficient in law to bar them, the plaintiffs, from having their aforesaid action, because they say that section 1553 of the Iowa Code, as passed by the 21st General Assembly of said State of Iowa, and which section is set out in said

plea, is unconstitutional and void, and that they are not bound by law to answer said plea, and this they are ready to verify. Wherefore, for want of a sufficient plea in this behalf, the plaintiffs pray judgment, and their damages, etc., to be adjudged to them, etc.

BLUM & BLUM,
Attorneys for Plaintiffs.

(Endorsed:) Filed July 19, 1886. Wm. H. Bradley, clerk.

16 Afterwards, to wit, on the sixth day of October, in the adjourned October term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Judgment.

GEORGE A. BOWMAN and FRED. W. BOWMAN
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

Trespass on the case.

Now come the parties, by their respective attorneys, and submit to the court the demurrer of the plaintiffs to the plea of the defendant filed herein, and the court, being now fully advised upon said demurrer, overrules the same. It is thereupon considered and adjudged by the court that judgment upon said demurrer be, and the same is hereby, entered against the plaintiffs and in favor of the defendant, and that this cause be dismissed at the costs of the plaintiffs, and that execution issue therefor.

17 Afterwards, to wit, on the ninth day of October, 1886, there was filed in said clerk's office a bond in said entitled cause, which said bond is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, Louis J. Blum and Alexander Downing, are held and firmly bound unto The Chicago and Northwestern Railway Company in the full and just sum of five hundred dollars, to be paid to the said The Chicago and Northwestern Railway Company, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of October, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately at an adjourned term of the circuit court of the United States in a suit depending in said court, between George A. Bowman *et al.* against The Chicago and Northwestern Railway Company, a judgment for costs was rendered against said George A. Bowman *et al. was rendered against the said George A. Bowman et al.*, and the said George A. Bowman *et al.* having obtained a writ of error

and filed a copy thereof in the clerk's office of the said court
18 to reverse the judgment in the aforesaid suit, and a citation directed to the said The Chicago and Northwestern Railway Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said George A. Bowman and Fred. W. Bowman, plaintiffs in said suit, shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

ALEXANDER DOWNING. [SEAL.]
LOUIS J. BLUM. [SEAL.]

Sealed and delivered in presence of—
LOUIS J. BLUM.

Approved by Wm. H. Bradley, clerk, as authorized by the court.
HON. H. W. BLODGETT.

Endorsed: Filed Aug. 9th, 1886. Wm. H. Bradley, clerk.

19 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court (except the original summons, which is misplaced or lost and cannot now be found) in the cause wherein George A. Bowman and Fred. W. Bowman are the plaintiffs and The Chicago and Northwestern Railway Company is the defendant, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this ninth day of October, 1886.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

WM. H. BRADLEY, *Clerk.*

20 UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings as also in the rendition of a judgment in a plea which is before you in said circuit court between George A. Bowman and Fred. W. Bowman, plaintiffs, and The Chicago and Northwestern Railway Company, defendant, in an action of *case*, a manifest error hath happened, to the great damage of the said George A. Bowman and Fred. W. Bowman, plaintiffs, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby com-

manded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1886, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this sixth day of October, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the 111th year.

[Seal Circuit Court U. S., Northern Dist. Illinois, 1855.]

WM. H. BRADLEY,
Clerk of the United States Circuit Court
for the Northern District of Illinois.

[Endorsed:] Supreme Court of the United States. George A. Bowman and Fred. W. Bowman, plaintiffs in error, *vs.* The Chicago and Northwestern Railway Company, defendant in error. Writ of error. Copy deposited for the defendant in error in the clerk's office U. S., northern district of Illinois.

21 UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

To The Chicago and Northwestern Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1886, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein George A. Bowman and Fred. W. Bowman are plaintiffs in error and The Chicago & Northwestern Railway Company is defendant in error, to show cause, if any there be, why the judgment mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett, district judge, this 6th day of October, in the year of our Lord one thousand eight hundred and eighty-six.

H. W. BLODGETT, *Judge.*

22 I hereby accept service of the within citation on behalf of the said The Chicago and Northwestern Railway Company, and hereby enter my appearance as its attorney in the United States Supreme Court in said cause.

Chicago, October 8th, 1886.

W. C. GOUDY,
General Counsel.

[Endorsed:] Supreme Court of the United States. —— *vs.* ——. Citation to October term, A. D. 18—.

23 In the Supreme Court of the United States. October Term, 1886.

GEORGE A. BOWMAN *et al.*
vs.
THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

Now come the plaintiffs in error, by Louis J. Blum, their attorney, and represent to the court that there is manifest error appearing on the face of the record, in this:

1. The circuit court erred in the law.
2. The circuit court erred in the facts.
3. The circuit court erred in overruling the plaintiffs' demurrer to the defendant's plea.
4. The circuit court erred in not rendering judgment for the plaintiffs.
5. The circuit court erred in rendering judgment in favor of defendant, wherefore the plaintiffs in error pray a reversal of said judgment.

LOUIS J. BLUM,
Attorney for Plaintiffs in Error.

Endorsed on cover: N. Illinois, C. C. U. S. No. 1196. George A. Bowman and Fred. W. Bowman, plaintiffs in error, *vs.* The Chicago & Northwestern Railway Company. Filed October 16, 1886.

IN THE SUPREME COURT

—OF THE—

UNITED STATES.

October Term, A. D. 1886.

GEORGE A. BOWMAN and
FRED. W. BOWMAN,
Plaintiffs in error,

vs.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY,
Defendant in error.

Writ of error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF FACTS.

The facts disclosed by the record in this cause are that plaintiffs in error are brewers and vendors of beer at Marshalltown, Iowa; and, in the course of that business, through their agent at Chicago, Illinois, offered to the defendant in error, for shipment to themselves at Marshalltown, five thousand barrels of beer, which defendant declined to transport; that defendant is a corporation, operating under charters from the states of Illinois and Iowa, its line of railway extending from Chicago to Council Bluffs through Marshalltown; that plaintiffs in error applied to the proper authorities to obtain the permit referred to in Section 1553 of the Code of Iowa, conformably to the requirements of Section 1526, to sell beer for mechanical, medicinal, culinary and sacra-

mental purposes, and were refused such permit; that, by reason of the refusal of the defendant to ship said beer, plaintiffs sustained damage to the amount of ten thousand dollars.

To justify this dereliction of duty as a common carrier, defendant in error pleads the passage by the General Assembly of Iowa of the Act following:

"Sec. 1553. If any express company, railway company, or any agent or person in the employ of any express company or railway company, or of any common carrier, or any person in the employ of any common carrier, or any person knowingly bring within this state for any person or persons, or corporation, or shall knowingly transport or convey between points, or from one place to another in this state, for any other person or persons or corporation, any intoxicating liquors, without first having been furnished a certificate from and under the seal of the County Auditor of the county to which said liquor is to be transported, or within which it is to be conveyed from place to place, certifying that the consignee or person to whom said liquor is to be transported, conveyed or delivered is authorized to sell such intoxicating liquors in such county, such company, corporation or person so offending, and each of them, and any agent of such company, corporation or person so offending, shall upon conviction thereof, be fined in the sum of one hundred dollars for each offense and pay costs of prosecution, and the costs shall include a reasonable attorney fee, to be assessed by the court, which shall be paid into the county fund, and stand committed to the county jail until such fine and costs of prosecution are paid. The offense herein defined shall be held to be complete and shall be held to have been committed in any county of the state through or to which the same is unloaded for transportation, or in which said liquors are conveyed from place

to place or delivered. It shall be the duty of the several County Auditors of this state to issue the certificate herein contemplated to any person having such permit, and the certificate so issued shall be truly dated when issued, and shall specify the date at which the permit expires as shown by the county records."

Defendant in error further alleges the failure of plaintiffs to exhibit the permit in compliance with the section quoted.

To this plea, plaintiffs in error demurred on the ground that said Section 1553, (above quoted,) is unconstitutional and void. This demurrer was overruled by the Circuit Court, and, plaintiffs electing to abide by their demurrer, said court rendered judgment in favor of the defendant, to reverse which judgment, a writ of error was sued out of this court.

QUESTIONS INVOLVED.

Plaintiffs in error contend that the Circuit Court erred in overruling their demurrer to said plea and rendering judgment in favor of defendant, for the reasons following:

Section 1553, above quoted, is unconstitutional and void, being in conflict with Section 8, Article 1, Constitution of the United States, which is as follows: "The Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes," in that

1. The power conferred by this clause is vested exclusively in Congress.

2. Section 1553 contravenes the will of Congress.

3. The power sought to be exercised by the Iowa Legislature in this behalf is not within the scope of the police power of the states.

4. Under the Laws of Iowa, this liquor was never a nuisance, but is still recognized to be property, and therefore any law affecting its transportation among the states is a regulation of inter-state commerce.

5. The intent of the Legislature in enacting said law was, like the effect of the law, to regulate commerce among the states.

6. The police power of the states can be exerted upon property only in an existing exigency. Section 1553 is not so exercised, but attempts to create a new and an extraordinary power, entirely unnecessary and superfluous.

ARGUMENT.

I.

The power conferred by said clause is vested exclusively in Congress.

This court has had frequent occasion to interpret this section of the Constitution, and we find established by the authorities the doctrine that the power conferred by it is the exclusive power in Congress to regulate commerce among the states, and that the states are precluded from the regulation of commerce of a national or an inter-state character.

Gibbons v. *Ogden*, 9 Wheat, 1.
New York v. *Miln*, 11 Pet., 511.
Maryland Case, 12 Id., 446.
Groves v. *Slaughter*, 15 Id., 511.
Passenger Cases, 7 How., 319.
Cooley v. *Board, etc.*, 12 Id., 319.

Brown v. *Maryland*, 11 Wheat, 438.
Crandall v. *Nevada*, 6 Wall., 35–49.
State Freight Tax, 15 Id., 232–293.
R. R. Co. v. *Fuller*, 17 Id., 560.
Welton v. *Missouri*, 91 U. S., 282.
Henderson v. *Mayor*, 92 Id., 259.
Chy Lung v. *Freeman*, Id., 275.
Sherlock v. *Alling*, 93 Id., 99.
R. R. Co. v. *Husen*, 95 Id., 469.
Gay v. *Baltimore*, 100 Id., 434.
County of Mobile v. *Kimball*, 102 Id., 697.
Telegraph Co. v. *Texas*, 105 Id., 460.
Moran v. *New Orleans*, 112 Id., 69.
Gloucester Ferry Co. v. *Pennsylvania*, 114 Id., 196.
Brown v. *Houston*, Id., 632.

In view of these authorities, surpassingly elaborate, it were a useless expenditure of time and energy to argue at length upon a principle, settled and indisputable. It is observed that the fundamental principles laid down by the case of Gibbons *v.* Ogden, *supra*, have undergone frequent supervision but no essential modification. The case of County of Mobile *v.* Kimball, *supra*, fixes the boundary line between federal and state commercial power. After dividing regulations affecting commerce into two classes, national and local, the court proceeds to define the latter to be regulations affecting only particular localities, to which class state authority is by the court restricted. Beyond doubt, the states possess this power; for the power vested in Congress is not to regulate commerce, but to regulate commerce among the states. But commerce of a national or an inter-state character has, by the Constitution and under the adjudications of this court, been effectually removed from state regulation, and we do not apprehend that the doctrine of a concur-

rent power remaining in the states will now find a serious champion to encounter reason.

In this case, the sole issue open to argument is whether Section 1553, above quoted, is a regulation of commerce among the states, or merely an act passed by the Iowa Legislature in the exercise of its police power, having for its object *and scope* the protection of the citizens of the state.

To realize the extent of the power here sought to be exercised by the state, it may be well to recall a few historical facts. Liquor has been a subject of lawful commerce since the days of ancient Egypt, has been recognized by this court to be lawful property, and is to-day so regarded by the Iowa Supreme Court, although, in certain events mentioned in Section 1543, it may become a nuisance. Equally true is it that its commercial properties are not dependent upon its locality, but that it has always been, and is to-day, an important branch of interstate commerce.

Having thus stood upon an equality with other property until the passage of this law, it follows, as a logical deduction, that this power of the states, if exertible upon liquor, extends as well to all other property; and, as an obvious corollary, if Section 1553 is constitutional, it is within the power of the state by the passage of an Act at any time to deprive any and every article of commerce of mercantile properties and value and prohibit its shipment into the state.

To the mind of the reflecting observer must occur the query: What power is this which the framers of the Constitution have conferred upon Congress? The power to regulate commerce, subject to the right of the states to determine what articles of commerce shall be regulated? A literal reading of the clause would then be: "Congress

shall have power to regulate among the states such commerce as the states may permit to be regulated." To hold this Act valid were to reverse the learned and exhaustive opinions above cited; for if a state can, by a simple concealment of its Act beneath a shadowy disguise or a meaningless pseudonym, still exert the power denied to it by these authorities, it matters little whether its power to do so is classed under the head of police power or another euphonious title. We are not concerned in the struggle for supremacy between substance and shadow.

II.

Section 1553 contravenes the will of Congress.

Suppose Congress to-day to pass a law regulating the sale and transportation of beer among the states, what would be the effect? Here would be two conflicting laws, enacted by two different sovereign powers, for the government of the same community. The Constitution and the Acts of Congress passed thereunder being declared by the Constitution to be the supreme law of the land, every Act inconsistent with them is invalid. Thus, we would find a law, passed by a state and never repealed, to stand void and inoperative. Such an Act could never be law, for it is not even embraced in the definition of law. Law is defined to be a rule of action, prescribed by the supreme power of a state. Is that a rule of action prescribed by the supreme power—a law which can at any time be annulled, through mere implication, by another and an entirely different power?

It is true, our duplex form of government is sometimes productive of an anomaly to which even the logic of definitions must yield; and so this court has held that the laws of a state upon harbors and pilotage, though superseded by subsequent laws of Congress, are, until

superseded, valid. But harbors and the like are matters affecting local commerce, over which the states have jurisdiction, as well as national commerce, over which Congress has jurisdiction, and it is easy to see where the state power in such a case finds origin and where it ends. So with regard to state laws concerning railroads, which are the conductors of local commerce under charters from the states. But these instances, by reason of the circumstances constituting their exceptionality, only demonstrate more clearly the principle upon which the rule is based.

This is now the actual state of affairs. There exists to-day this conflict between the state law and the will of Congress.

In the Revised Statutes of the United States, we find this provision:

"SECTION 5258. Every railroad company in the United States, whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its roads, boats, bridges, and ferries, all passengers, troops, Government supplies, mails, freight, and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination. But this section shall not affect any stipulation between the Government of the United States and any railroad company for transportation or fares without compensation, nor impair or change the conditions imposed by the terms of any act granting lands to any such company to aid in the construction of its road, nor shall it be construed to authorize any railroad company to build any new road or connection with any other road without authority from the state in which such railroad or connection may be proposed. And Congress may at any time alter, amend, or repeal this section."

Here is an express authorization by Congress to the defendant to ship the beer, comprised in the term "freight" in the above section. But, aside from this provision, Congress has declared that beer may be transported from state to state. There are two methods to express one's will, by action and by inaction. If the owner of a building permits it to remain, it is a fair inference that he does not desire some one else, who is not the owner, to remove it. In the absence of a restriction, commerce is free, and the inaction of Congress is a declaration of its intention that commerce in commodities unrestricted shall remain free and unimpeded. This construction is supported by the authority of this court in the cases following:

Passenger cases, 7 How., 399.
Welton v. *Missouri*, 91 U. S., 282.
County of Mobile v. *Kimball*, 102 id., 697.
Brown v. *Houston*, 114 id., 632.

In the case of Welton *v.* Missouri, *supra*, the court say: "The fact that Congress has not seen fit to prescribe any specific rules to govern inter-state commerce, does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-state commerce shall be free and untrammeled."

In the case of the County of Mobile *v.* Kimball, *supra*, the court, having reference to the question under consideration, employed the language following: "Its inaction in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free."

III.

The power sought to be exercised by the Iowa Legislature in this behalf is not within the scope of the police power of the states.

What is this power known as the police power of the states? This question has upon several occasions been passed upon by this court in the cases above cited; and though, from the nature of the power, it has been found impracticable to assign to it a definite field of jurisdiction, its maximum extent has been confined to certain limits. So far as articles of foreign or inter-state commerce are concerned, the police power of the states is held by this court to be the power of self-defense, possessed as well by a state as by its citizens. It is an extensive power. Under it, the state may exclude property diseased or infectious; may close its gates against improper personages; in short, may exercise that natural right of self-defense without which any existence would be lamentably precarious. This court has decided that, in the necessary exercise of this power, a state may destroy even a cargo of importations infected with disease. The reason for the existence of this power in every community is obvious; but the right of self-defense can exist only in the presence of actual danger; and, when it is sought to extend this power to the embracement of all property, there arises the inquiry: Are there no limits to this extraordinary power? This problem has been solved to an extent sufficient for our purpose, for we find the opinion of this court expressed in the following lucid terms:

"It is not necessary for the course of this discussion, to attempt to define it (the police power) more accurately * * * because whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it and no urgency for its use can authorize a

state to exercise it in regard to a subject matter which has been confided exclusively to the discretion of Congress by the Constitution."

Henderson v. *Mayor*, 92 U. S., 271.

"It is clear from the nature of our complex form of government that whenever the statute of a state invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the states."

Id., 272.

"Neither the unlimited power of a state to tax nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers conferred upon Congress by the Constitution." "It (the state) may not under the cover of exerting its police power, substantially prohibit or burden either foreign or inter-state commerce."

R. R. Co. v. *Husen*, 95 U. S., 472.

Chy Lung v. *Freeman*, 92 U. S., 275.

We come now to consider the only case perfectly analogous to this ever reviewed by this court. That is the case of R. R. Co. v. Husen, 95 U. S., 469, to the full text of which decision we beg leave to refer this Honorable Court. That case involved the validity of a Missouri statute, prohibiting the transportation of Texas cattle during certain periods into the state; and this court held that law to be unconstitutional. Between the principles involved in that case and those applicable to this, there exists no distinction. That law was declared to be unconstitutional because the legislature had not discriminated between diseased cattle and wholesome cattle. This Iowa law is open to the same objection. It must be borne in mind that, up to the time of the passage of this law, beer was in Iowa upon a commercial equality with

other property; with wholesome cattle, and not with diseased cattle. The value of beer was recoverable in the Iowa courts. The Legislature met, and beer, in certain contingencies stated in Section 1543, was suddenly transformed from a salable commodity to a nuisance. To what mysterious agency shall we impute this strange metamorphosis? Could the mere declaration of the Legislature have wrought such a miracle? For the purpose of illustration, we answer, yes. Then, if that is true, wholesome Texas cattle was also a nuisance in Missouri, because the Legislature of Missouri acted with regard to it just as the Legislature of Iowa acted with reference to liquor; that is, prohibited its entrance into the State.

IV.

Under the laws of Iowa, this liquor was never a nuisance, but is still recognized to be property, and therefore any law affecting its transportation among the states is a regulation of inter-state commerce.

This Missouri case establishes the principle that all property, in its ordinary condition and used as an object of traffic among the states, is subject to the exclusive control of Congress; but that when, by disease or otherwise, it is transformed so as to lose its character as property and to become a nuisance, no person or community is bound to suffer its presence. The distinction is not vague, nor is the language of the court ambiguous. In the light of this opinion, we propose to analyze this case. If the beer in question in this suit is indeed a nuisance, we claim for it no immunity; but between property infected with disease and liquor not infected, there exists a difference which it requires no captious observer to detect. An article infected with disease is in itself a fruitful source of disease, and disease is no property; it is a nuisance *per se*;

its proximity is dangerous; and, upon natural principles, not requiring the Iowa Legislature in their support, any community has power to forbid its entrance. But liquor, so far from coming within the definition of a nuisance *per se*, is declared by statute to be a nuisance only upon certain happenings, which can transpire only after the liquor has been incorporated into the mass of property of the state. The language of the statute declaring liquor to be a nuisance is the following:

"SEC. 1543. In cases of violation of the provisions of either of the three preceding sections or of section fifteen hundred and twenty-five of this chapter, the building or erection of whatever kind, or the ground itself in or upon which such unlawful manufacture or sale, or keeping with intent to sell, use or give away, of any intoxicating liquor is carried on, or continued, or exists, and the furniture, fixtures, vessels, and contents is hereby declared a nuisance and shall be abated as hereinafter provided, and whoever shall erect or establish, or continue, or use any building, erection or place for any of the purposes prohibited in said sections shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly, and upon conviction shall pay a fine of not exceeding one thousand dollars and costs of prosecution, and stand committed until the fine and costs are paid."

The three preceding sections and section 1525, to which section 1543 has reference, and the violation of any of which renders liquor a nuisance, are as follows:

"SEC. 1540. If any person not holding such a permit by himself, his clerk, servant or agent shall for himself or any person else, directly or indirectly, or on any pretense, or by any device, sell, or in consideration of the purchase of any other property, give to any person any intoxicating liquors, he shall, for the first offense be deemed guilty of a misdemeanor, and on conviction for said

first offense shall pay a fine of not less than fifty or more than one hundred dollars and costs of prosecution, and stand committed to the county jail until such fine and costs are paid; for the second and every subsequent offense he shall pay on conviction thereof a fine of not less than three hundred dollars nor more than five hundred dollars and costs of prosecution, and be imprisoned in the county jail, not to exceed six months." * * * *

"SEC. 1541. Any person who shall mix any intoxicating liquor with any beer, wine, or cider by him sold, and shall sell, or keep for sale, as a beverage, such mixture, shall be deemed guilty under the preceding section, and shall be punished accordingly."

"SEC. 1542. No person shall own, or keep to be in any way concerned, engaged, or employed in owning or keeping any intoxicating liquors with intent to sell the same within this state, or to permit the same to be sold therein in violation of the provisions hereof, and any person who shall so own or keep or be concerned, engaged or employed in owning or keeping such liquors with any such intent, shall be deemed, for the first offense, guilty of a misdemeanor; and on conviction for said first offense shall pay a fine of not less than fifty nor more than one hundred dollars and costs of prosecution, and shall stand committed to the county jail until such fine and costs are paid." * * *

"SEC 1525. Every person who shall manufacture any intoxicating liquors as in this chapter prohibited, shall be deemed guilty of a misdemeanor, and upon his first conviction for said offense, shall pay a fine of two hundred dollars and costs of prosecution, or be imprisoned in the county jail not to exceed six months, and on his second and every subsequent conviction for said offense, he shall pay a fine of not less than five hundred dollars nor more

than one thousand dollars and costs of prosecution, and be imprisoned in the county jail one year."

"In cases of violation of the provisions of the three preceding sections and section 1525," liquor is declared a nuisance. The three preceding sections, and section 1525, to which reference is had, provide that it shall be unlawful to manufacture, sell, and hold or own with intent to sell intoxicating liquors without a permit. Which preceding section to which reference is had by the section quoted, have plaintiffs in error violated? They have attempted to buy liquor and to have it shipped to them. It is lawful in Iowa to buy liquor without a permit, though it is unlawful for any person to manufacture or sell it, or hold or own it with intent to sell without a permit. But plaintiffs in error are willing to have all possible inferences drawn against them; then arises the question, what inference can be drawn? However guilty their intent, by what possibility could they have violated any of the preceding sections, the violation of which would render this liquor a nuisance? True, it might in time have become a nuisance under the statute, but the question is, did it? The liquor had never been in their hands, they could not have manufactured nor sold it without a permit, nor could they have held or owned it with intent to sell it contrary to law, so long as it was not in their possession. It was a moral and physical impossibility for plaintiffs to have violated any of the sections to which section 1543 contains allusion until the property had come into their possession, and this could not transpire until after it had left the possession of defendant. At the time, therefore, that it was to come into the possession of the Railway Company, and the time it was to remain in its possession, no law had been violated; and, under the Iowa Statutes, the liquor in question still retained its character as property. All this is true, not by reason of any peculiarities of this case;

but, as a general proposition, admitting of no exception, under the Iowa law, when liquor reaches the hands of common carriers in other states, and while it continues in their possession, no violation such as is contemplated by Sec. 1543 can take place, and it cannot, therefore, be a nuisance. Being property, and no nuisance, it is not subjectible to the police regulations of the state; and retaining its commercial properties, any law relating to it must necessarily be a regulation of commerce, and, until it becomes a part of the property of the state, it is insured by the Constitution against state interference.

Legal proceedings are in all cases requisite to determine whether or not a law has been violated; under section 1543, it is a matter of evidence as to the act or intent of the owner whether liquor is still property or has become a nuisance. Until a violation of one of the sections referred to occurs, liquor is still property, and can only become otherwise by its unlawful use. This construction is rendered by the Iowa Supreme Court in an authoritative case, the court employing the words following: "The object of the act" (a part of the prohibitory law) "of which the section above referred to is a part, is to suppress the manufacture, use of, and traffic in, intoxicating liquor, except for mechanical, medicinal, sacramental and culinary purposes. The traffic in such liquor, as an article of beverage, is prohibited; but for other purposes it is recognized as an article of commerce, as other property."

Monty v. *Arneson*, 25 Iowa, 385.

"Intoxicating liquor is the subject of property; the commerce in it as an article of beverage is unlawful, but its character as property is not thereby destroyed."

Id., 388.

Under Section 1543, furniture, fixtures, vessels and buildings become nuisances simultaneously and upon the

same terms with liquor. In fact, liquor is not expressly mentioned in the section, but is embraced by the term "contents," which embraces as well musical instruments if they happen to be in the building. Liquor, furniture, fixtures and buildings are embraced by this section. It treats them all with a commendable impartiality; and whenever one becomes a nuisance under the section, the others are at once endued with the same character. The same contaminating influence pervades them all; they stand or fall together. Now, can the state of Iowa prohibit the transportation of furniture and fixtures from other states, because these articles may, at some future time, be used for these unlawful purposes and become a nuisance?

V.

The intent of the Legislature, in enacting said law, was, like the effect of the law, to regulate commerce among the states.

In construing a law, recourse must at times be had to the intent of its creator as well as to its own effect. What was the intention of the Iowa Legislature in passing the prohibitory law? Did it intend to prohibit the shipment of liquor, on the ground that that product is a nuisance, or was it its intention to enact a commercial regulation, prescribing the terms upon which liquor can be shipped from other states?

It is true, the law provides that, upon the transpirement of certain events constituting a violation, which can be accomplished only by the manufacture, sale, or holding with intent to sell unlawfully, the particular liquor and the instruments employed shall be deemed a nuisance; but, until such an unlawful occurrence, liquor is not divested of its commercial character. It is lawful to hold

liquor if held with no intent to sell unlawfully; it is also lawful to buy liquor and to consume it. Moreover, section 1526 contains certain conditions, upon which the fortunate friends of a Board of Supervisors can obtain a permit for the sale and shipment of liquor for any purpose; and, to these persons holding permits, railroad companies are at liberty to ship.

"SEC. 1526. Any citizen of the state, except hotel-keepers, keepers of saloons, eating-houses, grocery-keepers and confectioners, is hereby permitted within the county of his residence to manufacture or buy and sell intoxicating liquors for mechanical, medicinal, culinary and sacramental purposes only, provided he shall first obtain permission from the Board of Supervisors of the county in which such business is conducted as follows:"

The law does not even provide that the liquors so transported under a permit shall be inspected upon admission to the state. Is liquor a less nuisance if shipped to a party holding a permit than if shipped to a person less intimate with the Board? While, for the purpose of argument, it may be conceded that the Legislature of a state has power to prescribe the conditions upon which persons may exercise an avocation within its boundaries, such a right is exercised by the Legislature under its power to regulate its internal commerce; and this law under consideration, prescribing the terms—not upon which a person may sell liquor in the state,—but the terms upon which he can ship it into the state from other states, is a regulation of commerce among the states.

Again, liquors imported from foreign countries are expressly excepted and may be brought into this state. Would that be so, if liquor were a nuisance and if it were the intention of the Legislature to prohibit its use

and sale? This court has decided that, when the necessity to destroy cargoes exists by reason of their diseased or dangerous character, it matters not that the cargo consists of foreign goods.

Passenger Cases, 7 How., 414.

Had the Legislature regarded liquor to be a nuisance, it would have excluded foreign, as well as domestic, liquor. Is foreign liquor a less nuisance than domestic liquor? In what consists the distinction between the commercial standing of liquors, foreign, and domestic? In law, there is none, and any power exercisible upon the one can also be exerted upon the other. The principle established by this court is: "The state can no more prohibit or regulate that (commerce) which is inter-state than it can that which is with foreign nations." "That the transportation of property from one state to another is a branch of inter-state commerce, is undeniable."

R. R. Co. v. *Husen*, 95 U. S., 469.

A legislature must be presumed to know the law, whatever violence that presumption might sometimes wreak upon truth. The Legislature of Iowa, while permitting the free ingress of liquor imported from foreign countries, denies to liquor shipped from other states the right of entrance unless consigned to persons having a permit,—a pre-requisite which the board can under the law arbitrarily refuse to grant, as is demonstrated by this case. Is this a police regulation or a regulation of commerce?

VI.

The police power of the states can be exerted upon property only in an existing exigency; Section 1553 is not so exercised, but attempts to create a new and an extraordinary power, entirely unnecessary and superfluous.

There is another principle which banishes from the domain of reason the thought that this is a law properly enacted under the police power of the state. It has been decided by this court that the police power of the state cannot be exerted upon a mere caprice nor as a moral experiment, but that the power can arise only from an existing exigency. "Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity."

Chy Lung v. *Freeman*, 92 U. S., 280.

What sudden emergency has arisen calling for this extraordinary exercise of power in Iowa? Has anything unexpected occurred? Was liquor suddenly obtruded upon an innocent and unsuspecting public, or did it change character, or the citizens, their habits? But, conceding, for the purpose of illustration, the existence of a necessity for the abolition of the use and sale of liquor, and the intention of the Legislature to act upon that requirement, in what manner does the adoption of Section 1553 become requisite to the enforcement of the state policy? The state of Iowa has enacted most stringent and arbitrary laws against liquor and its sale, and has provided for a violation wonderful and exemplary punishments. If those laws are not co-extensive with the necessity existing, the state has power to proceed within its territory, even to the extent of capital punishment. It can enact local laws, which, if properly executed, can suppress the use or sale of liquor as effectually as that result can be attained by legal methods. And such laws operate upon the liquor

after its incorporation into the property of the state, when it is subject to state jurisdiction. If the state desires to prohibit the use of fire-crackers within its territory, what is its proper mode of procedure? Shall it prohibit the Chinese to import the property, or prohibit its use to its own citizens? If it adopts the latter method, and the law is properly enforced, what need of the former law, even if proper and constitutional? A simple test in this case will reveal a like superfluity. Eliminating Section 1553 from the Code of Iowa, we find the policy of the Legislature to remain unchanged, and the laws necessary for its enforcement still to exist. No doubt, by the enforcement of Section 1553, the suppression of the sale of liquor is facilitated; far more effectively so would it be, would the Legislature enact that liquor shall not be brought within a thousand miles of the state boundaries; but an act resting strictly upon a necessity cannot be based on mere convenience. In the cases cited, this Court holds that this police power in the states can exist and be exercised upon commerce only in the presence of an absolute exigency, and refutes the assumption that it can be exerted merely to facilitate the enforcement of another law, for the enforcement of which proper means and methods can, under the ordinary powers of the state, be provided. Why extend the power of the state to fields so boundless and extraordinary, when that power is utterly superfluous? Why make use of vast means to compass a useless end? The demonstration of its unnecessity is in itself sufficient ground to render the law—though it were else impervious—unconstitutional and void.

Respectfully submitted,

LOUIS J. BLUM,
Attorney for Plaintiffs in Error.

125-465
125-465

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1886.

GEORGE A. BOWMAN and FRED. W. BOWMAN, *Plaintiffs in Error.* vs. **THE CHICAGO AND NORTH-WESTERN RAILWAY COMPANY,** *Defendant in Error.*	In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF FOR DEFENDANT IN ERROR.

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vs.
THE CHICAGO AND NORTH-WESTERN RAILWAY COMPANY,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT.

In order to present the question arising in this case it will be necessary to refer somewhat in detail to the statute law of the State of Iowa respecting the manufacture, sale and use of intoxicating liquors. By section 1,523 of Chapter 6 of the Code of Iowa of 1873, it is declared, that no person shall manufacture or sell any intoxicating liquors, except as in that Chapter provided; that the keeping of such liquors with intent to sell the same is prohibited, and such liquor so kept, together with the vessels in which it is contained, shall be a nuisance, and shall be forfeited as in that Chapter provided.

Section 1,524 of Chapter 6 provides that nothing in that Chapter shall be construed to forbid the sale by the importer thereof of foreign intoxicating liquor, imported under the authority of the laws of the United States regarding the importation of such liquors, and in accordance with such laws.

Section 1,525 as amended by the Act of April 3, 1884, (Laws of 1884, page 146) provides that every person who shall manufacture any intoxicating liquor as in that Chapter prohibited shall be guilty of a criminal offense and punished as specified.

Section 1,526 as amended by the Act of April 3, 1884, provides that any citizen of Iowa, except hotel, saloon, eating-house and grocery keepers and confectioners, is permitted within the county of his residence to manufacture or buy and sell intoxicating liquors for mechanical, medicinal, culinary and sacramental purposes only, provided he shall first obtain permission from the board of supervisors of the county in which such business is conducted.

Sections 1,527 to 1,531 as amended by the Act of April 3, 1884, relate to the manner of applying for the permit to the board of supervisors, provide for a hearing upon the application, for granting or refusing the same, and for the giving of a bond by the person to whom the permit may be issued in the penalty of $3,000, conditioned to comply with the law.

Section 1,540 as amended by the Act of April 3, 1884, makes it a criminal offense for any person, not holding such a permit, to sell any intoxicating liquors.

Section 1,542 as amended by the Act of April 3, 1884,

makes it a misdemeanor to own or keep any intoxicating liquors with intent to sell, or permit the same to be sold in the State of Iowa in violation of the law, and section 1,543 as amended by the last named Act, provides that in cases of violation of sections 1,524, 1,540 and 1,542, the building or erection, or the ground itself, in or upon which the unlawful manufacture or sale or keeping with intent to sell, use or give away, of any intoxicating liquor is carried on or continued or exists, and the furniture, fixtures, vessels and contents shall be a nuisance and shall be forfeited.

Section 1,553 as amended by an Act approved April 5, 1886 (Laws of 1886, page 83), is thus:

"If any express company, railway company, or any "agent or person in the employ of any express company "or railway company, or if any common carrier, or any "person in the employ of any common carrier, or any "person, knowingly, bring within this State for any person "or persons or corporation, or shall knowingly transport "or convey between points or from one place to another "in this State for any other person or persons or corpora- "tion any intoxicating liquors without first having been "furnished a certificate from and under the seal of the "county Auditor of the county to which said liquor is to "be transported, or is consigned for transportation, or "within which it is to be conveyed from place to place, "certifying that the consignee or person to whom said "liquor is to be transported, conveyed or delivered, is "authorized to sell such intoxicating liquors in such "county, such company, corporation or person so offend- "ing, and each of them and any agent of such com- "pany, corporation or person so offending, shall, upon "conviction thereof, be fined in the sum of one hundred

"dollars for each offense and pay costs of prosecution,
"and the costs shall include a reasonable attorney's fee,
"to be assessed by the court, which shall be paid into the
"county fund, and stand committed to the county jail until
"such fine and costs of prosecution are paid. The offense
"herein defined shall be held to be complete and shall be
"held to have been committed in any county of the State
"through or to which said intoxicating liquors are trans-
"ported or in which the same are unloaded for transpor-
"tation, or in which said liquors are conveyed from place
"to place, or delivered. It shall be the duty of the several
"county Auditors of this State to issue the certificate
"herein contemplated to any person having such permit,
"and the certificate so issued shall be truly dated when
"issued and shall specify the date at which the permit
"expires, as shown by the county records."

Section 1,554 provides that the law shall be so construed as to cover the act of giving as well as selling intoxicating liquors by persons not authorized.

By an Act approved March 4, 1884 (Laws 1884, page 8), section 1,555 (which provided that the words intoxicating liquors wherever used in Chapter 6 should mean alcohol and all spirituous and vinous liquors), was repealed, and in lieu thereof it was enacted that those words shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquors, and that no person shall manufacture for sale, or sell, or keep for sale, as a beverage, any intoxicating liquors whatever.

The law of Iowa being as thus indicated, on the 15th day of June, 1886, plaintiffs in error, citizens of Iowa and Nebraska, respectively, brought an action on the case against defendant in error, a citizen of Illinois, in the court

below, alleging in each of the two counts of their declaration, that defendant was possessed of and operating a railway, and was a common carrier of goods thereon, from Chicago, Illinois, to Council Bluffs, Iowa, and that it was its duty to carry from and to all stations on its line of railway all freight tendered to it for shipment; that on the 20th day of May, 1886, plaintiffs tendered to defendant for shipment from Chicago to Marshalltown, Iowa, a station on such line of railway, five thousand barrels of beer directed to plaintiffs at Marshalltown, and requested defendant to receive and ship the same over its line of railway to plaintiffs at Marshalltown, Iowa, but defendant refused to receive and ship such beer. There are other averments in the second count to the effect, that plaintiffs attempted to obtain from the supervisors of Marshall county, Iowa, wherein Marshalltown is located, the permit required by the Iowa laws, but failed to obtain it, and that the beer tendered to defendant for shipment was purchased by plaintiffs at Chicago at $6.50 per barrel for shipment to Marshalltown, where they could have sold it for $8 per barrel. Defendant filed a special plea, averring that the beer in each count of the declaration mentioned, was intoxicating liquor within the meaning of the statute of Iowa thereinafter set forth, and was offered to defendant to be transported from the State of Illinois to the State of Iowa; that on the 5th day of April, 1886, the General Assembly of the State of Iowa passed an Act, which is set forth in the plea, and is section 1,553 above printed in full; that plaintiffs did not at any time furnish defendant with a certificate from the county Auditor of Marshall county, Iowa, the county to which such beer was offered for transporation, certifying that the person for or to whom such beer was to be transported was

authorized to sell intoxicating liquors in that county, wherefore defendant refused to receive such beer for transportation, and assigned at the time of its refusal, the statute of Iowa prohibiting defendant from transporting it into that State.

Plaintiffs demurred to this plea, and the court below overruled the demurrer and entered final judgment for defendant, and this writ of error was brought to reverse that judgment.

Plaintiffs in error contend that the statute set up in the plea is void on the supposed ground that it is a regulation of commerce among the States, and this is the only ground upon which they assail the plea and the judgment of the lower court. If section 1,553 be a valid police regulation, or be otherwise the lawful exercise of the legislative power of the State of Iowa, then the judgment must be affirmed.

BRIEF.

I.

Section 1,553 does not affect the transportation of intoxicating liquors through the State of Iowa, or from within to without the State. It merely prohibits the carriage of such articles from point to point within the State, or from points without to points within it, and this only in the event that the consignee thereof has no lawful authority to receive the same within the State of Iowa. None of the prohibitions of the Iowa laws affect foreign intoxicating liquors, imported under the laws of the United States.

II.

The laws of Iowa prohibit the sale and giving away of intoxicating liquors as a beverage. These laws are within the power of the State to enact and enforce, and in order to accomplish the purposes for which they were made, the State must have the power to use such means as are reasonably necessary to secure that end. One of those means is to prohibit the manufacture of such liquors within the State for the purposes prohibited. But it would be idle to stop at this point and leave the transportation of such liquors for the prohibited purposes from without to within the State, free. Therefore, to secure the enforcement of the prohibition of the sale and giving away of

such liquors within the State for drinking purposes, the State may prohibit their transportation from without to within the State in all cases where the consignee shall not have a permit to receive them within the State. It must be presumed, in favor of the law, that a person who cannot obtain the required permit would use the liquors in a manner prohibited by the law, and, therefore, the effect of section 1,553 is to deny the right to bring them into the State to be there used for unlawful purposes.

III.

It is admitted that, under the commerce clause of the constitution of the United States, the power of the Congress to regulate commerce among the States is exclusive, as to all subjects of commerce that are in their nature national, or admit only of one uniform system or plan of regulation. Nevertheless, it is equally well established by the decisions of this Court, that the States possess the sole power to adopt and enforce police regulations, and that, by the exercise of this power, they may properly pass and enforce laws, which, to a greater or less degree, affect the transportation of freight and passengers between the States. The fact that the same means may be employed by a State to execute one of its reserved powers, as might properly be used by the Congress to enforce the powers granted by the national constitution, does not prove that the powers are identical, or that the action of the State is an infringement upon the national authority.

Gibbons v. *Ogden*, 9 Wheat., 203–5, 235.
License Cases, 5 How., 504, 589.
Mayor of N. Y. v. *Miln*, 11 Peters, 102.

State Tax of Railway Gross Receipts, 15 Wall., 284, 293.
Sherlock v. *Alling*, 93 U. S., 99.

IV.

The police power of the States extends to the protection of the lives, health and property of its citizens, and to the preservation of good order and the public morals.

Beer Co. v. *Massachusetts*, 97 U. S. R., 25.

This power "is co-extensive with self-protection, and is not inaptly termed the law of overruling necessity. It is that inherent and plenary power in the State which enables it to prohibit all things hurtful to the comfort, safety and welfare of society." *Town of Lake View* v. *Rose Hill Co.*, 70 Ill., 191.

The exercise of this power is so essential to the welfare of society, that the State may not grant it away, nor can the contract clause of the constitution of the United States be successfully invoked to protect corporations chartered by the State, or persons having grants of privileges from the State, from legislation within the limits of this power, even where its effect is to deprive them of powers conferred by their charters or grants.

Beer Co. v. *Massachusetts*, *supra*.
Boyd v. *Alabama*, 94 U. S., 645, 650.
Stone v. *Mississippi*, 101 U. S., 814.

It is settled in this Court that State laws prohibiting the manufacture and sale of intoxicating liquors, are valid po-

lice regulations, and are not repugnant to any provision of the constitution of the United States.

Bartemeyer v. *Iowa*, 18 Wall., 129.
Bear Co. v. *Massachusetts*, *supra*.

There is an unbroken line of decisions to the same effect by the State courts, in so far as such prohibiting laws relate to the sale of liquors not in existence within their jurisdiction at the time of their enactment. These authorities all proceed upon the proposition, that such laws look to the prevention of intemperance, pauperism and crime, and to the preservation of the public peace, health and morals.

Commonwealth v. *Intoxicating Liquors*, 115 Mass., 153.
People v. *Hawley*, 3 Gibbs (Mich.), 330.
Lincoln v. *Smith*, 27 Vt., 328.
Santo v. *State*, 2 Clarke (Iowa), 165.
Littleton v. *Fritz*, 65 Iowa, 488.
Preston v. *Drew*, 33 Maine, 559.
State v. *Paul*, 5 R. I., 185.
Perdue v. *Ellis*, 18 Geo., 586.
Austin v. *State*, 10 Mo., 591.
Metropolitan Board v. *Barrie*, 34 N. Y., 657.
Goddard v. *Jacksonville*, 15 Ill., 588.
Cooley's Cons. Lim., 5 Ed., 718–721.

The police power of the State may be exercised by refusing admission into its territory of articles infected with disease, or that may corrupt the morals or endanger the health or lives of its citizens. This power of exclusion extends to persons, as well as things, and by its exercise,

the State may prevent the admission of convicts, lepers, persons afflicted with incurable diseases, lewd and debauched women, paupers, idiots, lunatics, or others, who from physical causes, are likely to become a public charge. The limit to this power is, that the thing done in its exercise, must be necessary for self-protection.

Passenger Cases, 7 How., 400, 410, 415, 457.
License Cases, 5 How., 589, 592, 628, 631, 632.
Gilman v. *Philadelphia*, 3 Wall., 730, 731.
Matter of Ah Fook, 49 Cal., 403.
In re Ah Fong, 3 Sawyer, 144.
Railroad Co. v. *Husen*, 95 U. S., 465, 471.

The laws of Iowa make no discrimination between the productions of the State of Iowa or the property of its people, and the productions of other States or the property of people of other States. The same regulations apply to the prohibited articles, regardless of their origin or ownership. This circumstance relieves them of objections to their constitutional validity that were held well founded in *Welton* v. *Missouri* (91 U. S., 275), and other like cases. The provision that the permit to sell or manufacture may be granted to no one but a citizen of Iowa, does not impair the statute. In *Pierce* v. *New Hampshire* (one of the License Cases) the law, which was held to be constitutional, limited the right to sell to residents of the place where the license was issued within the State.

License Cases, 5 How., 555.
Austin v. *The State*, 10 Mo., 591.

ARGUMENT.

The defendant in error has at all times, since the Act of the General Assembly of Iowa, of April 5, 1886, amending section 1,553 of the code of 1873, took effect, yielded obedience to its provisions, acting in the belief that this law was within the power of the State to enact and enforce. The severe penalty provided for its violation would, however, have been regarded as a sufficient reason to refuse to challenge its validity, even had there been a doubt on the part of the defendant in error of the constitutionality of the statute. We shall not review here the long line of decisions by this Court, giving interpretation to the commerce clause of the constitution of the Union. It is all sufficient for the purpose of presenting our views upon the question involved, to accept as authoritative (as it is) the opinion of this Court in *Railroad Co.* v. *Husen*, 95 U. S., 465. In that case, the question decided was, as to the validity of a statute of Missouri, which prohibited the driving or conveying of *any* Texas, Mexican or Indian cattle into that State, between the first of March and the first of December, in each year. The statute there in question, was not limited in its operation to cattle affected with disease, but applied to all Texas, Mexican and Indian cattle. This Court held, that it was more than a quarantine regulation, and not a legitimate exercise of the police power of the State, and under cover of a police regulation, it was a mere regulation of inter-state com-

merce, and as such, void. In the opinion in that case it is said:

"We are thus brought to the question whether the "Missouri statute is a lawful exercise of the police power "of the State. We admit that the deposit in Congress "of the power to regulate foreign commerce and com- "merce among the States, was not a surrender of that "which may properly be denominated police power. "What that power is, it is difficult to define with sharp "precision. It is generally said to extend to making "regulations promotive of domestic order, morals, health "and safety. As was said in *Thorp* v. *Railroad Co.*, 27 "Vt., 149, 'it extends to the protection of the lives, limbs, "health, comfort and quiet of all persons, and the protec- "tion of all property within the State. According to the "maxim, *sic utere tuo ut alienum non lædas*, which, being "of universal application, it must, of course, be within "the range of legislative action to define the mode "and manner in which every one may so use his "own as not to injure others.' It was further said "that by the general police power of a State, 'per- "sons and property are subjected to all kinds of re- "straints and burdens, in order to secure the general "comfort, health and prosperity of the State; of the perfect "right of the legislature to do which no question ever was, "or upon acknowledged general principles ever can be "made, so far as natural persons are concerned.' It may "also be admitted that the police power of a State justi- "fies the adoption of precautionary measures against "social evils. Under it a State may legislate to prevent "the spread of crime, or pauperism or disturbance of the "peace. It may exclude from its limits convicts, paupers, "idiots and lunatics, and persons likely to become a public

"charge, as well as persons afflicted with contagious or "infectious diseases; a right founded, as intimated in *The* "*Passenger Cases*, by Mr. Justice Greer, in the sacred "law of self-defense. The same principle, it may be con- "ceded, would justify the exclusion of property danger- "ous to the property of citizens of the State; for example, "animals having contagious or infectious diseases. All "these exertions of power are in immediate connection "with the protection of persons and property against "noxious acts of other persons, or such a use of property "as is injurious to the property of others. They are "self-defensive. * * * While we unhesitatingly ad- "mit that a State may pass sanitary laws, and laws for "the protection of life, liberty, health or property within "its borders; while it may prevent persons and animals "suffering under contagious or infectious diseases, or con- "victs, etc., from entering the State; while for the purpose "of self-protection, it may establish quarantine and reason- "able inspection laws, it may not interfere with transporta- "tion into or through the State, *beyond what is absolutely* "*necessary for its self-protection.* It may not, under the "cover of exerting its police powers, substantially pro- "hibit or burden either foreign or inter-state commerce. "* * * Tested by this rule, the statute of Missouri "is a plain intrusion upon the exclusive domain of Con- "gress. It is not a quarantine law; it is not an inspection "law. It says to all natural persons and to all transpor- "tation companies: 'You shall not bring into this State "any Texas cattle, or any Mexican cattle, or Indian "cattle, between March 1 and December 1, in any year, "*no matter whether they are free from disease or not, no* "*matter whether they may do an injury to the inhabitants* "*of the State or not;* and if you do bring them in, even

"for the purpose of carrying them through the State "without unloading them, you shall be subject to extra- "ordinary liabilities.' Such a statute, we do not doubt, it "is beyond the power of a State to enact. * * * The "police power of a State cannot obstruct foreign com- "merce or inter-state commerce, *beyond the necessity for "its exercise;* and under color of it, objects not within "its scope cannot be secured at the expense of the pro- "tection afforded by the Federal constitution."

The State of Iowa has the power to prohibit the sale and giving away of intoxicating liquors, within its borders, for drinking purposes. This proposition is settled beyond all question by the decisions of the Supreme Court of that State and of this Court, as well as by the determinations of many other courts of last resort in other States. This power proceeds upon the principle, that its exercise is necessary to protect society from the evils which inevitably flow from the unrestrained use of intoxicating liquors as a beverage. These evils are conceded by all, and can be denied by none. Every judge who wrote an opinion in *The License Cases* admitted their existence, and also the propriety and necessity of the restraining powers of the States upon the subject. Thus Justice GRIER there says: "It is not "necessary, for the sake of justifying the State legislation "now under consideration, to array the appalling statistics "of misery, pauperism and crime, which have their origin "in the use or abuse of ardent spirits. The police power, "which is exclusively in the States, is alone competent to "the correction of these great evils, and *all measures of "restraint or prohibition necessary to effect the purpose are within the scope of that authority.*" In *Preston* v. *Drew* (33 Maine, 560), it is said, that the common use of in-

toxicating liquors "operates to diminish the productive-
"ness of labor; to injure the health; to impose upon the
"people additional and unnecessary burdens; to produce
"waste of time and of property; to introduce disorder
"and disobedience to law; to disturb the peace, and to
"multiply crimes of every grade."

The right of the State to make and enforce a law prohibiting the sale and giving away of intoxicating liquors as a beverage, is founded in necessity, in the right of self-protection, in the "sacred law of self-defense." To make this prohibition effectual, the State may prohibit the manufacture within its limits of such liquors, for drinking purposes. This is conceded, because it is established by all the authorities relating to the question. The right to prohibit the manufacture for the interdicted purposes is based on the same necessity, upon the same right of self-protection, upon the same sacred law of self-defense, as the right to prohibit the sale or giving away for those purposes. It is necessary to prevent the manufacture for unlawful purposes, in order to prevent their use for such purposes. But, must state action stop there? Can it go no further? Can it not provide and enforce the additional prohibition, that such liquors shall not be brought into its limits to be sold or given away as a beverage, excepting from its operation, however, foreign intoxicating liquors, imported under the laws of the United States and sold in the original packages? Such a further prohibition is necessary—absolutely necessary—to enable the State to enforce its prohibitory laws, and to prevent the unnumbered devices that cunning and cupidity will resort to in order to evade the prohibition which, admittedly, the State has a right to execute.

The 1553d section of the Iowa law differs from the Missouri statute, held void as before noted, in the important respect, that in the case of the Iowa statute, the inhibition upon transportation from points without to points within the State begins and ends with the necessity for the inhibition in order to execute within the State an admitted police power of the State; while in the case of the Missouri statute, the inhibition upon such transportation went far beyond the limits of the necessity for self-protection, and, under color of the police power, boldly intruded upon the powers committed by the federal constitution to Congress. And it may be added, that the Iowa statute places no restriction upon transportation through the State. It was not necessary, in order to keep diseased cattle out of the State of Missouri, to prohibit the bringing within that State, during the period from March 1 to December 1 in each year, *all* Texas, Mexican and Indian cattle. It was all sufficient for that purpose, to prohibit the conveyance into that State of diseased cattle only. So the State of Iowa could not prohibit the conveying into its limits of *all* intoxicating liquors, in order to prohibit their sale or giving away for drinking purposes within that State. It has not attempted to do that thing, but has only prevented the conveyance of such articles into the State, when consigned to a person in that State who has no permit to use them for lawful purposes, and therefore to a person who, it must be presumed, will use them in violation of law.

It is said that intoxicating liquors are recognized by the Iowa law as property, and, therefore, their transportation into that State cannot be prohibited by State law. They are property in Iowa under certain conditions, and under other conditions they are not property there.

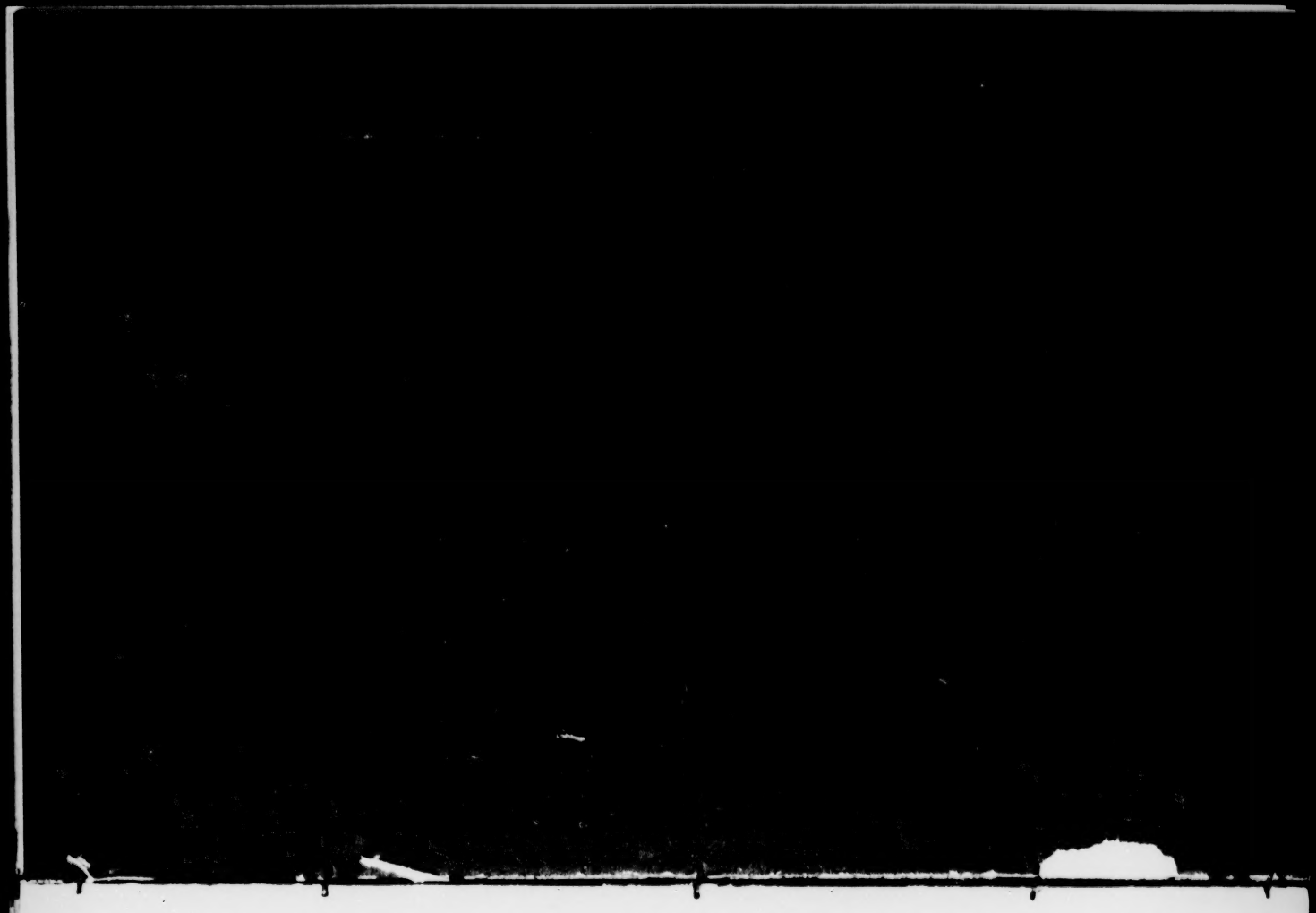
They are not property when sold or given away, or when kept for sale or giving away, for drinking purposes, nor are they property when manufactured in that State for drinking purposes, or brought into it for such purposes. In all of these conditions, such liquors are nuisances, subject to condemnation and destruction as such, and they are no more property than an obscene and indecent book or picture is. The law of Iowa, giving to such liquors the character of nuisances, when made or used for purposes prohibited by law, duly enacted under the police powers of the State, is a valid regulation, as shown by cases cited in division IV of this brief.

The section of the Iowa statute in question, it appears, interferes with the conveyance of intoxicating liquors into that State no further than is absolutely necessary to properly execute the lawful police regulations of the State, and of its provisions it may be said, as Mr. Justice WOODBURY said of the license laws, whose validity was sustained in the License Cases:

"They aim, then, at a right object. They are calculated to promote it. They are adapted to no other; and no other or sinister or improper view can, therefore, either with delicacy or truth, be imputed to them."

JAS. E. MUNROE,
Attorney for Defendant in Error.

W. C. GOUDY,
Counsel.



IN THE

Supreme Court of the United States.

OCTOBER TERM, A D. 1886.

GEORGE A. BOWMAN and FRED. W. BOWMAN,
Plaintiffs in Error,
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY,
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT.

The defendant is a common carrier, owning and operating a railroad, extending from Chicago, in the State of Illinois, to Marshalltown, in the State of Iowa, and beyond.

After the passage of the act hereinafter set forth, the plaintiffs tendered to the defendant 5,000 barrels of beer, and demanded that the defendant, as a common carrier, should receive and transport the same to Marshalltown in the State of Iowa. No certificate, such as is specified in the statute of Iowa hereinafter quoted, was furnished to the defendant, and no bond of indemnity offered. The defendant refused to receive and transport the beer to

Marshalltown, for the reason which was stated at the time of the refusal, that it was prohibited from so doing by section 1553 of chapter 143, Acts of the Twentieth General Assembly of Iowa. (Laws of Iowa, 1884, 150.) The section is as follows:

"SEC. 1553. If any express company, railway company, or any agent, or person in the employ of any express company or railroad company, or if any common carrier or any person in the employ of any common carrier, or if any other person shall knowingly bring within this State for any other person or persons, or corporation, or shall transport between points within the State for any other person or persons, or corporation, any intoxicating liquors, without first having been furnished with a certificate from and under the seal of the county auditor of the county to which said liquor is to be transported or is consigned for transportation, certifying that such consignee, or person for or to whom said liquor is to be transported, is authorized to sell such intoxicating liquors in such county, such company, corporation or persons so offending, and each of them, and any agent of such corporation or company so offending shall, upon conviction thereof, be fined in any sum not exceeding one hundred dollars for each offense, and shall stand committed to the county jail until such fine and the costs of prosecution are paid, and one-half of the fine shall go to the informer and the other half shall go to the school fund of the county; *and provided further*, that the offense herein defined shall be held complete, and shall be held to have been committed in any county of the State through or to which said intoxicating liquors are transported, or in which the same are loaded for transportation; *provided further*, that it shall be the duty of the several county auditors of this State to issue the certificate herein contemplated to any person having such permit, and the certificate so issued shall be truly dated where issued, and shall specify the date at

which the authority or permit expires, as shown by the county records."

The alleged plea that the beer was intoxicating liquor, within the meaning of the statute; that the person to whom thesame was consigned, was not authorized to receive and sell such intoxicating liquors under the laws of Iowa, and that the certificate named in the statute was not furnished, and assigned as a reason for refusing to receive and transport such freight, that it was prohibited by the statute of Iowa, aforesaid.

A demurrer was filed to this plea. The only point made upon the demurrer was, that the section was in conflict with section 8, article 1 of the constitution of the United States, which is as follows: "The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The demurrer was overruled by the Circuit Court, and from that decision this writ of error is prosecuted.

The only point made against the plea, is the unconstitutionality of the act. If the statute is constitutional, the plea is admitted to be a defense to the action.

BRIEF.

I.

While it is conceded that Congress has the exclusive power to regulate commerce among the States, it is equally true that the several States have the sole power to enact police regulations, and in the exercise of such power may do many things which more or less affect the transportation of persons and freight between the States.

Wiggins Ferry Co. v. East St. Louis, 107 U. S., 374.
Gibbons v. Ogden, 9 Wheat., 1.
Mayor of N. Y. v. Miln, 11 Pet., 102.
Osborne v. Mobile, 16 Wal., 479.
Sherlock v. Alling, 93 U. S., 99.

II.

The police powers comprehend all those general powers of internal regulation necessary to secure peace, good order, health, comfort, morals and quiet of all persons, and the protection of all property in the State. Congress cannot legislate on the internal police of a State. The power of a State over its police regulations being supreme.

New Orleans Water Works Co. v. St. Tammany Water Works Co., 14 Fed. Rep., 202.

Ex parte Schroder, 33 Cal., 279.

R'y Co. v. Bowers, 4 Houst., 506.

Munn v. Ill., 94 U. S., 197.

R'y Co. v. Jacksonville, 67 Ill., 37.

Davids v. R'y Co., 17 Ga., 323.

Bartemeyer v. Iowa, 18 Wall., 113.

The statute of Nevada imposing a tax upon merchandise brought into the State held constitutional.

In re Rudolph, 2 Fed. Rep., 66.

Tax imposed on sales of merchandise in Alabama held constitutional.

The court says: "The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by citizens of Alabama or other States, and whether the goods sold are the product of that State or some other. There is no attempt to discriminate injuriously against the products of other States, or the rights of their citizens, and the case is not therefore an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama."

Woodruff v. Parham, 8 Wall., 140.

Hinson v. Lott, 8 Wall., 152.

The law of New York requiring a report as to passengers brought into the State is a police regulation.

City of New York v. Miln, 11 Peters, 102.

Statutes like the statute of Iowa now under consideration are police regulations established by the legislature for the prevention of intemperance, pauperism and crime, and for the abatement of nuisances, and are constitutional.

Cooley's Constitutional Limitations, 581.

Commonwealth v. Kendall, 12 Cush., 414.

Commonwealth v. Clapp, 5 Gray, 97.

Commonwealth v. Howe, 13 Gray, 26.

Santo v. State, 2 Ia., 202.

One House v. State, 4 Greene (Ia.), 172.

Zumhoff v. State, 4 Greene (Ia.), 526.

State v. Donehay, 8 Ia., 396.

State v. Wheeler, 25 Conn., 290.

Reynolds v. Gary, 26 Conn., 179.

Ovitt v. Pond, 29 Conn., 479.

People v. Howley, 4 Mich., 244.

Gill v. Parker, 31 Vt., 610.

Meshmier v. State, 11 Ind., 482.

Vanderbilt v. Adams, 7 Cowan, 351.

It has been expressly decided by this court that as a measure of police regulation looking to the preservation of public morals a State law prohibiting the manufacture and sale of intoxicating liquor is not repugnant to any clause of the constitution of the United States.

Bartemeyer v. Iowa, 18 Wall., 129.

Beer Co. v. Mass., 97 U. S., 33.

Foster v. Kansas, 112 U. S., 205.

This law has been decided to be constitutional, in its main provisions at least, by the Supreme Court of Iowa.

Littleton v. Fritz, 22 N. W. Rep., 641.

It is a well settled rule, that courts will not declare legislative enactments void by reason of their repugnance to constitutions, State or federal, except when the judicial mind is clearly convinced of such repugnancy.

The legislature cannot part with any of the police powers of the State which are matters that affect the public peace, public health, public morals and public convenience.

Farmers' Loan and Trust Co. v. Stone et al., 20 Fed. Rep., 270.

Allerton v. City of Chicago, 6 Fed. Rep., 555.

In re Wong Yung Quy, 2 Fed. Rep., 624.

Beer Co. v. Mass, 97 U. S. Ct., 32 and 33.

It is well settled now that the States have the power to prohibit the sale of intoxicating liquors within the borders of the State. This prohibition must necessarily be a restriction upon the importation of such liquors from other States, and if the prohibition was made for the purpose only of preventing such importation, it would be void, but when made for the protection of morals, public health and good order, it is clearly within the power of the State.

The right to prohibit the bringing of certain articles into the State because such importation endangers the public safety, is not affected by the fact that the articles so prohibited may be articles of property and of value as property. When the public safety demands it the State has the right to prohibit the bringing of articles of property within the limits of the State, or to impose conditions or restrictions upon such importation for the protection of the public health, morality and good order. This right has always been exercised by the States without question.

Certain articles of property deemed prejudicial to the morals of the people have been excluded by the laws of the States.

Revised Statutes of Illinois, Chap. 38, Sec. 379, excludes certain books, pamphlets, engravings, models, casts, lithographs, photographs, etc.

See Sec. 9289 Howard's Annotated Statutes of Mich.

Section 4032, Statutes of Iowa.

Section 4590 Statutes of Wisconsin.

Section 12, Chap 100, Revised Statutes of Minnesota.

In nearly every State restrictions are laid upon the importation of certain articles for the protection of the public health. Dynamite can be brought into Michigan and many other States only when packed and marked in a certain manner involving large expense.

ARGUMENT.

The State of Iowa acting through its General Assembly in 1884 so amended its prohibition liquor law as to make it apply to ale, beer and domestic wines. This court, and the courts of many of the States have full power to do this, notwithstanding the laws of Congress recognize the commercial character of such liquors. The right to enact such laws is conceded to the States for the reason that it is a recognized fact that the traffic in ardent spirits is a public evil. That the use of liquors is dangerous to health, destructive of morals, and a source of pauperism and crime, and therefore a proper subject for police regulation by the States. To concede this to our minds is to concede that the suit of the plaintiff is not well grounded.

We submit that an examination of the law in question as passed in 1884, and amended in 1886, will show that the object and intent of it was simply and solely to prevent he sale and use of intoxicating liquors within the State.

Experience has shown that it was impossible to prevent the use and sale of this beverage while such intoxicating liquors might be freely manufactured and transported from point to point within the State or imported into the State without restriction, so the legislature undertook to prohibit the manufacture inside of the State, and impose certain conditions upon the transporting of intoxicating liquors within the State, and upon importing them into the State. It needs no discussion to show that the terms of this law apply equally to liquors manufactured within the State of Iowa, or transported from point to point within the State, and liquors manufactured out of the State and transported into it.

There is no pretense that the intent or effect of the law is to give the people of the State of Iowa any advantage over the people of any other State in the manufacture and transportation of intoxicating liquors. An inspection of the debates of the convention which framed the constitution of the United States will satisfy any one that the objects of the provisions of section 8, article 1, was to prevent the inhabitants of any State from imposing unequal burdens upon citizens of other States, and this was the sole object of that section. In this case that section of the constitution is now relied upon for the purpose of removing any unequal burden imposed by the law of the State of Iowa upon any citizen of another State, or any restriction upon the commerce of other States, which does not apply equally to the commerce of Iowa, but its aid is invoked for the sole purpose of nullifying the power of the State of Iowa to suppress the use and manufacture of intoxicating liquors within the limits of the State, and to prevent an injury resulting therefrom to the health, morals and good order of the people of that State.

If Congress has the exclusive power to regulate commerce among the several States, it is equally true that each State has the exclusive power to enact its own police reg-

ulations, and with those police regulations Congress has no concern. If it be within the power of the people of the State of Iowa to pass the amendment to the State constitution above quoted, it is equally within their power to adopt all necessary means to enforce it, and it is not within the power of Congress to nullify it by any legislation.

It is conceded by counsel for plaintiff substantially that the State has the right to pass a prohibitory law, and it has been so decided so often in this court that it may be considered as settled, but it is contended by counsel: 1st. That it is not necessary to carry into effect the statute of Iowa, that this provision contained in section 1553, should be enforced, and 2nd. That if it were necessary then the whole law is a violation of the constitution of the United States. I shall not discuss the question whether the State has the right to pass the prohibitory law, assuming that that is settled.

I shall only discuss the question stated, whether section 1553 is a proper provision to carry into effect the object of the statute.

First. I suggest that the question as to what means are necessary to enforce this law of the State of Iowa is to be decided by the law-making power of that State, and not by this court, unless it shall be clearly manifest that the provisions of the law violate the provisions of the constitution of the United States.

By the terms of the section now under discussion, the legislature of Iowa does not prohibit the transportation of intoxicating liquors into that State, but it imposes certain conditions and restrictions upon such importation.

It requires that the person to whom such intoxicating liquor is consigned, shall be a person who is authorized to receive and hold the same and sell the same for lawful purposes under that statute, or in other words that intoxicating liquors shall not be brought into the State for the purpose of violating the law of the State.

What right of any person residing in the State of Iowa, what honest purpose of any person is to be secured by declaring the law unconstitutional?

The object of the law is to protect the health, morals and good order of the people of the State of Iowa, and the means it adopts to secure this end affect equally the citizens of the State of Iowa and the citizens of other States. Neither the reason nor the object of the section of the constitution of the United States, now under discussion, require that this section should be held void.

Then it is clear that the power of the national government has been invoked to prevent the people of the State of Iowa from effectually prohibiting the manufacture, sale and use, as a beverage, of intoxicating liquors within that State, for that that is the object of this suit, I submit to the court, admits of no question.

The only reason which seems to be insisted upon against the power of the State of Iowa to enact this section, is that intoxicating liquors is property, and therefore it may be taken anywhere within the United States. I submit that if the law of Iowa, so far as it seeks to prohibit the sale and use as a beverage of intoxicating liquors within the State of Iowa, is a valid law, then by the terms of that law intoxicating liquor within the State of Iowa is not property in that broad sense of the term. It is no more property than any other article which may be declared a nuisance by a valid law. But if it is property, I think this court will hesitate before laying down the proposition that the State in the exercise of its powers may not prohibit the importation into the State of any article which it deems prejudicial to the health, morality and good order of its citizens. If this principle was to be adopted, statutes in other States which have been passed, and which are admitted to be purely police regulations, would be rendered invalid.

Much stress has been placed in the argument of counsel

for plaintiff upon the case of *Railroad Company v. Husen*, 95 U. S., 469. The point decided in that case was simply this, "that the State could not prohibit the transportation of cattle into and through its territory beyond what was necessary for self-protection. It was decided that the importation of diseased cattle might be prohibited, although they were property and of value; the reason why their importation might have been prohibited was because such importation would bring infectious diseases into the State of Iowa. The reason why the legislature of the State of Iowa might not prohibit the carrying through the State of cattle not infected with contagious disease is upon the ground that such prohibition was not necessary for the protection of the people of Iowa, and would practically give advantage to the people of Iowa over the people of other States."

To make the decision in that case in point in this case the decision should have held that the importation of cattle being diseased with an infectious disease should not have been prohibited by the State of Iowa, because they were property, unless this court is willing to go further and decide that the law making power of the State of Iowa is mistaken in supposing that intoxicating liquor is injurious to the health, morality and good order of the people of the State, and to decide as matter of fact that such importation is not injurious to the welfare of the people of Iowa, and consequently not property subject to police regulation.

Two propositions of fact certainly appear from this record:

First That the object of the statute was one clearly within the power of the State.

Second. That this object could not be attained if citizens of other States have the right, by virtue of the constitution ot the United States, freely to import intoxicating

liquors into the State against the will of the people of the State.

To say that a State shall never pass upon a question as to what is a proper police regulation, is simply to say that it shall never enact any police regulation whatever. I submit, that after a State has thus passed upon a question, and the effect of its determination could result in no possible discrimination between the citizens of its own State and the citizens of other States: and no attempt has been made to discriminate against the products of other States, or the rights of their citizens, no case is made for the interference of national authority.

III.

This is no new feature in the laws of Iowa. The first prohibitory law in the State was passed as early as 1851. The provisions for its enforcement however were so loose that the law was violated with impunity by various subterfuges.

Since the year 1855 there has been in force in the State of Iowa laws prohibiting the manufacture and sale of intoxicating liquors as a beverage.

The law as first enacted was very sweeping in its provisions, including all kinds of intoxicating liquors.

By an act of the legislature of Iowa, passed January 28, 1857 (chapter 157, laws of Sixth General Assembly, page 231), provision was made for the sale of intoxicating liquors for "*mechanical, medicinal, culinary* and *sacrimental purposes only*," under certain regulations, requiring the person so selling to obtain a *permit* in the manner and under the restrictions pointed out in the law.

Section 7 of this act of January 28, 1857, was as follows:

"If any railroad conductor, freight agent, expressman, depot master, or other person in the employment or in any way connected with any railroad company, or any

teamster, stage driver, or common carrier of any kind, or any person professing to act as agent for any other person or persons, whether within or without this State, or any other individual of whaver calling, shall bring within this State for any other person or persons, any intoxicating liquors without first having been furnished with a copy of the certificate authorizing such person or persons to sell such intoxicating liquors certified, etc., such person so offending shall be deemed guilty of a misdemeanor, and" etc.

This remained in force as the law of the State of Iowa upon that subject until amended by act of the General Assembly of Iowa, approved April 3, 1884, when the law now before the court for its consideration was enacted. The points of difference between the law as it formerly existed and the present law, is:

First. The act of January, 1857, did not operate directly on the railroad and express companies, etc., but was directed against the conductors, stage drivers and agents of such companies, whereas the present law operates against the principal as well as against the agent and employe.

Second. The act of January, 1857, only prohibited the bringing of such liquors into the State, whereas the present law in addition thereto prohibits its transportation between points within the State.

Third. The two acts differ in the penalties and in the minor details.

So far as this cause and the questions involved are concerned, however, there is no material difference in the two laws. The greatest difference being that in the old law there was a discrimination that is not in the present law, in this, that while the old law prohibited the transportation of liquors from point without the State to points within the State, it did not, as does the law now before the court, prohibit such transportation between points wholly within the State of Iowa.

The court will see by an examination of the laws of Iowa for the suppression of intemperance that the statute does not in any particular interfere with the regulations of commerce as established by Congress, or commercial treaties.

Section 1524 of the Code provides as follows: "Nothing in this chapter shall be construed to forbid the sale, by the importer thereof, of foreign intoxicating liquor imported under the authority of the laws of the United States regarding the importation of such liquors and in accordance with such laws."

The question involved in this case is whether the provisions of the Iowa statute, limiting the sale of intoxicating liquors as it does is an authorized exercise of the police powers of the State, or whether it is an attempt upon the part of the State "to regulate commerce among the several States?"

The right of the State to prohibit the sale of intoxicating liquors is not now an open question as stated by Mr. Justice Miller in *Bartemger v. Iowa*, 18 Wal., p 132. "It has never been seriously contended that such laws raised any question growing out of the Constitution of the United States * * * no case has held that such a law was void as violating the privileges or immunities of citizens of a State or of the United States. If, however, such a proposition is seriously urged, we think that the right to sell intoxicating liquors, so far as such right exists, is not one of the rights growing out of citizenship of the United States."

This point being established, viz: that the States have the right—in so far as any restrictions upon part of the Constitution of the United States is concerned—to prohibit the sale and traffic in intoxicating liquors within their borders, we think it follows as a corrollary of the conceded point, that the State must have the power to make its laws on this subject effectual to prevent the evils

designed to be prevented. That the State has the right to enact and enforce such legislation as will prevent evasion of its laws.

If such necessary safeguards affect in some degree the commerce in the prohibited liqors as between the States enacting the law and sister States, it does not thereby follow that it is a regulation of commerce among the several States as contemplated by Sec. 8, Art. 1, of the Constitution of the United States.

We claim, therefore, that the law in question is simply an exercise of the police power of the State. That the object of this law is the promotion of the health, happiness, morality and material prosperity of the citizens of the State. That not only has this court so recognized these laws for the suppression of intemperance, but it has, by numerous expressions of the great and learned men who now do and have heretofore composed the court, commended this class of legislation as wise and prudent.

That the States possess this power there can be no question.

While we admit the proposition that to Congress exclusively belongs the power to regulate commerce among the States, we nevertheless claim that it is just as clearly settled that to the States belong the exclusive right to regulate its domestic police.

While it is true that general regulations respecting commerce, when enacted by Congress, may incidentally affect the police of the State, and yet not be violation of the reserved rights of the State, it is also true that laws respecting the internal police of the State may, in their operation, interfere with commerce to a certain extent, and nevertheless be a valid exercise of State legislation.

See *Gibbons v. Ogden*, 9 Wheat., at p. 204.

It is not the remote effect of a law that determines its character; it is the apparent aim and object of it.

"It cannot be correctly maintained that laws which may remotely or incidentally affect commerce are on that account to be deemed void. To render them so they must be *essentially and directly* in conflict with some power clearly invested in Congress by the Constitution; and, I may say, with some regulation actually established by Congress."

Mr. Justice Daniel in License Cases, at p. 615.

Speaking upon this same subject Mr. Justice McLean says (5 How., p. 590): "These are not regulations of commerce, but acts of self-preservation. And although they affect commerce to some extent, yet such effect is the result of the exercise of an undoubted power in the State."

It may be well, right here, to consider the question:

What are police laws?

Probably no general definition can be framed that will express fully the idea.

It may be said, in a general way, that it is the inherent right of communities to protect themselves. It is to communities what the law of self-defense is to the individual. It is the first law of nature and is superior to written laws or constitutions.

It is varying as circumstances vary. That may become essentially a required exercise of police power at one time, which did not exist in a former time. This view of it is most tersely and aptly stated by Mr. Justice McLean in License Cases, 5 How., at p. 591-2:

"In all matters of government, and especially of police, a wide discretion is necessary. It is not susceptible of an exact limitation, but must be exercised under the changing exigencies of society. In the progress of population, of wealth, and of civilization, new and vicious indulgencies spring up, which require restraints that can only be imposed by the legislative power. When this power shall

be exerted, how far it shall be carried, and where it shall cease, *must mainly depend on the evil to be remedied*

"Under the pretense of a police regulation, a State cannot counteract the commercial powers of Congress. And yet, as has been shown, to guard the *health*, *morals* and *safety* of the community, the laws of a State may prohibit an importer from landing his goods, and may sometimes authorize their destruction."

This language completely covers the thoughts I had in my mind when attempting in my crude way to define police powers. I do not desire to read this learned court a lecture on temperance. I am not a temperance lecturer, but we cannot shut our eyes to the potent fact that of all agencies known to society there are none which in so great a degree and so directly contribute to debauch society as the intemperate use of intoxicating liquors. None are so prolific in the impairment of *health*, the destruction of *morals*, or the *safety* of life as this one agency.

Every morning paper has its chapter, showing as a result of this accursed traffic the disruption of marital and family ties, the fatal quarrels among former friends, the destruction of life and property, the outraging innocence, while the great bulk of crime and pauperism is traceable to this source. The stay of this curse has been the study of legislators and philanthropists for ages, and it would be no fancy flight of imagination to say that he who could obliterate the traffic from the face of the earth would be cannonized as man's greatest benefactor.

But let us still further pursue this question of what is the police power of the State. Chief Justice Marshall says in *Gibbons v. Ogden*, 9 Wheat., at p. 203, that it includes "inspection laws, quarantine laws, health laws of *every description*."

Again the same learned jurist says, in *Brown v. Maryland*, 12 Wheat., at p. 443: "The power to direct the *removal* of gunpowder is a branch of the police power

which unquestionably remains and should remain with the State, and the *removal* of infectious or unsound articles is doubtless a branch of the same power."

If the power of *removal* is a part of the police power, why would it not be just as competent to stop the bringing in of the offensive substance as to direct its *removal* after it is brought in?

But let us see further if this control over the traffic in intoxicating liquors in the State is not an exercise of police power.

In 1847 the license cases came before this court. It was among the first State efforts at controlling the traffic. It was contended by the plaintiffs in error in these cases that the laws which they were attacking amounted to prohibition in the traffic of intoxicating liquors. This was the position taken by Mr. Webster, that as applied to imported liquors it was a regulation of foreign commerce.

This view did not receive the sanction of the court. It was held to be a proper exercise of the police power of the State.

I have already quoted from Mr. Justice McLean on this. I further quote from the same Justice, at page 592. He says: "If a foreign article be injurious to the health or morals of the community, a State may, in the exercise of that great and conservative police power which lies at the foundation of its prosperity, prohibit the sale of it. No one doubts this in relation to infected goods or licentious publications."

And further, in these same cases, I will quote from Mr. Justice Woodbury, pp. 627, 628, where he says:

"From the first settlement of this country, and in most other nations, ancient or modern, civilized or savage, it has been found useful to discountenance excesses in the use of intoxicating liquors. * * * The tendency of such laws clearly is to reduce family expenditures, secure *health, lessen pauperism and crime*, and co-operate

with, rather than counteract, the apparent policy of the general government itself in respect to the disuse of ardent spirits.

"*They aim, then, at a right object. They are calculated to promote it. They are adapted to no other.* And no other, or sinster or improper view can, therefore, either with delicacy or truth, be imputed to them."

This is just what we claim is the direct and only object of the Iowa laws for the suppression of intemperance. They are not, strictly speaking, prohibitory. That is, they only prohibit the traffic and sale in the channels wherein experience has shown the evils to exist, viz.: as a beverage.

The language of that part of the law which is prohibitory, is as follows:

"Wherever the words intoxicating liquors occur in this chapter, the same shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquors, and all intoxicating liquors whatsoever; and no person shall manufacture for sale, sell, or keep for sale, as *a beverage*, any intoxicating liquors whatever, including ale, wine and beer." (Sec. 1555 of the Code, as amended by 20th G. A. See page 8, acts 20th G. A. of Iowa.)

Section 1524 of the Code exempts the law from the operation of the laws of Congress respecting importations.

Sections 1526 to 1538, inclusive, provide for the sale of liquors for mechanical, culinary, medicinal and sacramental purposes, and makes provision for the shipment of liquor to such persons as hold the permit to sell for lawful purposes. And these further provide penalties for shipping to persons other than those so authorized to sell. This is done, not with a view to regulate or embarrass commerce, but solely for the purpose of preventing evasive violations of the law.

Viewed in this light, then (that is, in the light of the

object of the law), it must be conceded to be an exercise of rightful police power.

The incidental effect viz: that in some degree it interferes with commerce, is not the controlling feature in construing the law. It must be construed in reference to its ultimate aim and object; and construing it thus we may very properly, quote from the language of Chief Justice Marshall, in *Gibbons v. Ogden*, at p. 204: "So if a State, in passing laws on subjects acknowledged to be within its control, and with a view to applying it to these subjects, shall adopt a measure of the same character which *Congress may adopt*, it does not derive its authority from the particular power which has been granted, but from some other which remains with the State, and may be executed by the same means."

Again, in *Patterson v. Kentucky*, 97 U. S.. at page 506, Mr. Justice Harlan uses the following strong language in refence to these powers of the States:

"This court has never hesitated by the most rigid rules of construction, to guard the commercial power of Congress against encroachments in the form or under the guise of State regulations, established for the purpose and with effect of destroying or impairing rights secured by the Constitution. It has, nevertheless, with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of society, of upholding State police regulations which were enacted in good faith and had appropriate and direct connection with that protection to life, health and property which each State owes its citizens."

This question of the object of the State law is always a proper question of inquiry. If the apparent object is to hinder or obstruct commerce then the courts do not hesitate to declare the law void. If however the object is the promotion of the good order, peace, morality, health and prosperity of the State, and the good faith of this inten-

tion is apparent, then the court will uphold the law as a proper and legitimate exercise of the police power of the State, even though in its operations it may interfere with subjects over which the powers of Congress are supreme and exclusive.

In a greater or less degree all this mass of police laws affect commerce. Inspection and quarantine laws stop the cargo and passengers at the borders of the State and detain them, and under certain conditions refuse to admit them; may even throw the cargo into the sea if necessary to protect life or health. If food, and it is adulterated or impure, it may be refused admittance. In like manner obscene literature or prints may be refused admittance. Many similar laws that in their enforcement interfere with commerce might be instanced, but it is not necessary. This court is familiar with them and will readily see the particular point I desire to make.

The simple question is, it being admitted that the State may pass laws in restrainst of intemperance, and to prohibit the use of ardent spirits as a beverage—can it go so far as to prohibit its shipment into the State—from sister States—to be there kept and sold in violation of its laws?

As will be seen by reference to section 1524 of Code, already quoted, this law does not attempt to interfere with the subject of importations, upon which Congress has legislated.

It seems to me that it would be a solecism to say to a State: "You may prohibit the sale of liquors as a beverage, but you cannot prevent your common carriers from bringing such liquors into the State for the purpose of being sold in violation of your laws." Common experience would teach any one that a law so hampered would be a dead letter upon the statute books. This view of the case is well put by Mr. Justice McLean in License Cases, at p. 595, where he says:

"If the mere conveyance of property from one State to

another shall exempt it from general State regulation, it will not be difficult to avoid the police laws of any State, especially by those who live near the border."

It is claimed by plaintiff in error that intoxicating liquor is property, and recognized as such by the laws of the United States.

The only specific recognition that is given to intoxicating liquors as property by Congress is in the laws regulating its importation. As has already been shown the law now under consideration does not interfere with such laws. Aside from this recognition there is no more property recognition in regard to liquors than there is in regard to gunpowder, or dynamite, or a glandered horse, or a cow having anthrax; or than there is in adulterated food, or any other chattel that experience has shown to be deleterious to health. There is no more property in intoxicating liquors than there is in lottery tickets, indecent prints, obscene books, cards and dice, and gaming apparatus, and before the war, in slaves. And yet there has never been a question as to the right of a State in the absence of congressional legislation on the subject, to exclude any or all of these from the State; to prevent their introduction, to stop them at the border.

In the language of Mr. Justice Woodbury, in License Cases, page 628:

"It is conceded that States may exclude pestilence, either to the body or mind"—and he might have said, and soul—"shut out the plague or cholera, and, no less, obscene paintings, lottery tickets and convicts."

Holmes v. Jennison, 14 Pet., 568.

Gibbons v. Ogden, *supra*.

Mayor of N. Y. v. Miln, 11 Pet., 102.

I cannot better close the consideration of this subject than by using the language of that eminently pure and

able jurist, Mr. Justice Grier, found in 5 How., pp. 631, 632.

"It has been frequently decided by this court that the powers which relate to merely municipal regulations, or internal police, are not surrendered by the States, or restrained by the Constitution of the United States; in relation to these the authority of the State is complete, unqualified and conclusive.

"Laws for the punishment of crime, for the preservation of public peace, health and morals, must come within this category. As subjects of legislation, they are, from their very nature, of primary importance; *they lie at the foundation of social existence;* they are for the *protection* of *life and liberty*, and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience or luxury, to recede, when they come in conflict or collision, '*salus populi suprema sex.*'

"It is for this reason that quarantine laws, which protect the public health, compel mere commercial regulations to submit to their control. They restrain the liberty of passengers, they operate on the ship, which is the instrument of commerce, and its officers and crew, the agents of navigation. They seize the infected cargo and cast it overboard. * * * All these things are done, *not from any power which the State assumes to regulate commerce or to interfere with the regulations of Congress but because police laws for the preservation of health, prevention of crime, and protection of public welfare, must, of necessity, have full and free operation, according to the exigency which requires their interference.*

"It is not necessary, for the sake of justifying the State legislation now under consideration, to array the appalling statistics of misery, pauperism and crime which have their origin in the use or abuse of ardent spirits. The police power which is exclusively in the States, is alone competent to the correction of these great evils, *and all umeasres*

of restraint or prohibition necessary to effect the purpose are within the scope of that authority. There is no conflict of power, or of legislation, as between the States and the United States; each is acting within its sphere, and for the public good, and if a loss of revenue should accrue to the United States from a diminished consumption of ardent spirits, she will be the gainer a thousand fold in the health, wealth and happiness of the people."

When it is considered that this opinion was rendered in a case involving this same traffic, which was then only sought to be restrained by license—but then, as ever, impatient and intolerant of any restraint; then, as now, determined to have no interposition between it and its victim—it seems almost as if the venerable Justice had risen from his tomb to make his voice heard in defense of this later legislation in behalf of humanity, of the home and its purity, of the peace and welfare of society.

I cannot for a moment bring my mind to the conclusion that this court will do otherwise than uphold this law. It is not sought to be broken down in the interest of advanced humanity, in the interest of health, material prosperity or morality. It is a suit brought by those opposed to all laws of restraint of the drink traffic, for the express purpose of breaking down this formidable barrier to their illicit trade. It is the saloon interest of Iowa making the Macedonian cry to its co-disciples in Illinois to come to their aid, and break down the law which restrains them. No public good is sought to be subserved by so doing. Evil, and only evil, can be the result of a compliance with their demand.

IV.

One more point of consideration and we have done. I have heretofore adverted to the feature of the law which exempts its operation from interfering with the laws of Congress respecting the importation of liquors.

I now raise the point that this is one of the class of cases in which the State, in absence of congressional legislation, may protect itself against the evils of this traffic, even to an interference with commerce.

This distinction is clearly made and forcibly stated in the license cases by the learned Chief Justice, especially in drawing the distinction between the New Hampshire case and the Massachusetts and Rhode Island cases. At page 578 he makes the distinction in this language:

"The present case, however, differs from *Brown v. Maryland* in this, that the former was one arising out of commerce with foreign nations, which Congress had regulated by law; whereas the present is a case of commerce between two States, in relation to which Congress has not exercised its power."

The learned Chief Justice then argues the proposition in what seems to me to be unanswerable logic.

In respect to this Mr. Justice McLean says (5 How., at 595): "there is no act of Congress to which the license law as applied to this case can be held repugnant, and the general power in Congress to regulate commerce among the several States under the restrictions in the Constitution, cannot affect the validity of the law."

In the same case Mr. Justice Catron holds to the same views, and argues upon it at length, and at page 605 says: "But as no general law of Congress has regulated commerce among the States, such a rule cannot apply here."

With this Mr. Justice Daniel also agrees, and says at page 615: "It cannot be correctly maintained that State laws which may remotely or incidentally affect foreign commerce are on that account to be deemed void. To render them so, they must be essentially and directly in conflict with some power clearly invested in Congress by the Constitution; and I would add, *with some regulation actually established by Congress in virtue of that power*."

Mr. Justice Nelson concurred in the opinion delivered

by the Chief Justice, and Mr. Justice Catron; and Mr. Justice Woodbury very decidedly holds to the same opinion (see page 624). Mr. Justice Grier did "not consider the question of the exclusiveness of Congress to regulate commerce as necessarily connected with the decision," and so announced no opinion upon that point. He was fully satisfied that it was an exercise of an undoubtedly valid police power; and if, as such, it incidentally affected commerce, it was not for that reason void.

See, also on this subject:

Munn v. Illinois, 94 U. S.

C., B. & Q. R. R. v. Iowa, 94 U. S., 155.

Peck v. C. & N. W. R. R., *id.* 164.

In the last case cited the court say: "Until Congress acts in reference to the relations of this company to inter-State commerce, it is certainly within the power of Wisconsin to regulate its fares, so far as they are of domestic concern. * * Until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, *even though it may indirectly affect those without.*"

Similar language is used in the other cases cited.

In *Wilson v. Blackbird Creek Marsh*, 2 Pet., 251, Chief Justice Marshal says the law of Delaware could not "be considered as repugnant to the power to regulate commerce *in its dormant state.*"

Again, in *Gillman v. Philadelphia*, 3 Wal., 730, the same doctrine is enunciated, and in delivering the opinion Mr. Justice Swayne says: "The power to regulate commerce covers a wide field, and embraces a great variety of subjects. Some of these subjects call for uniform rules, and National legislation; others can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such

localities respectively. *To this extent the power to regulate commerce may be exercised by the States.*" Police laws passed to protect the health, morals and safety of communities are undoubtedly of this latter class.

United States v Dewit, 9 Wal., 41.

Again, in *Osborne v. Mobile*, 16 Wal., at p. 482, Chief Justice Chase uses the following language: "It is to be observed that Congress has never undertaken to exercise this power in any manner inconsistent with the municipal ordinance under consideration, and there are several cases in which the court has asserted *the rights of the States to legislate*, in the absence of legislation by Congress, upon subjects over which the Constitution has clothed that body with legislative authority."

V.

The statement of the plaintiffs in error, and the record admits that the 5,000 kegs of beer are sought to be shipped into the State to be sold in violation of the law.

The counsel say: "The facts disclosed by the record are that plaintiffs in error are brewers and venders of beer at Marshalltown, Iowa," and goes on to state that it was in the course of that business that they sought to have this beer shipped to them. This avowal of the unlawful purpose for which the shipment is demanded, it seems to me, ought effectually to dispose of the case. If this court compels common carriers to transport liquors into Iowa for the express purpose of being sold in violation of its laws, then it is a hollow mockery to affirm the constitutional right of the State to prohibit such sales.

Without further remark I desire to submit the case upon the part of the State of Iowa with this argument in defense of the validity of its laws.

A. J. BAKER,
Attorney-General.